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Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States

JOHN D. CERQUEIRA,
Petitioner,
v.

AMERICAN AIRLINES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

Michael T. Kirkpatrick
Counsel of Record
Public Citizen Litigation Group
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

David S. Godkin
Birnbaum & Godkin, LLP
280 Summer Street
Boston, MA 02210
(617) 307-6100

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QUESTIONS PRESENTED

Petitioner John D. Cerqueira sued respondent American Airlines under 42 U.S.C. § 1981 after American removed Cerqueira from a flight and refused to rebook him after the police cleared him for travel. American claimed that both decisions were based on safety concerns; Cerqueira claimed that the decisions were motivated by discrimination. Cerqueira presented direct evidence of discriminatory animus by lower-level employees who influenced the decisions, and circumstantial evidence of discrimination by the formal decisionmakers. A jury found for Cerqueira but the First Circuit reversed, holding that the discretion granted airlines in 49 U.S.C. § 44902(b), to refuse to transport a passenger for safety reasons, precludes airline liability for decisions motivated by a passenger's race unless there is direct evidence of discriminatory animus by the formal decisionmaker. The questions presented are:

1) Whether, and in what circumstances, a defendant is liable for discrimination if its decisionmaker relied on information tainted by a subordinate's discriminatory animus;

2) Whether, and in what circumstances, a plaintiff may use indirect evidence to prove discrimination in activities other than employment; and

3) Whether the statutory discretion granted to airlines in 49 U.S.C. § 44902(b), to refuse to transport a passenger for safety reasons, immunizes airlines from liability for denial-of-service decisions motivated by race.

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PETITION FOR A WRIT OF CERTIORARI

A jury found that respondent American Airlines intentionally discriminated against petitioner John D. Cerqueira in violation of 42 U.S.C. § 1981 when it removed him from a flight and denied him further service. The district court upheld the verdict. The U.S. Court of Appeals for the First Circuit vacated the verdict and ordered that judgment be entered for American. The First Circuit rejected the application of respondeat superior and the use of indirect evidence outside the employment discrimination context, and held that the discretion granted to airlines in 49 U.S.C. § 44902(b), to refuse to transport a passenger for safety reasons, creates a conflict between safety and civil rights, and permits the use of racial profiling in airline denial-of-service decisions. The First Circuit's decision conflicts with the decisions of other courts of appeals on each of the three questions presented, each of which is of national importance. For the reasons that follow, this Court should grant review.

OPINIONS BELOW

The amended opinion of the U.S. Court of Appeals for the First Circuit (Pet. App. 1a) is reported at 520 F.3d 1. The Memorandum Opinion and Order of the U.S. District Court for the District of Massachusetts (Pet. App. 43a), upholding the jury verdict, is reported at 484 F. Supp. 2d 232. The First Circuit's order denying rehearing and rehearing en banc with two dissenting opinions (Pet. App. 63a) is reported at 520 F.3d 20. The Errata Sheet amending

the First Circuit's original opinion (Pet. App. 74a) is unpublished.

JURISDICTION

The judgment of the U.S. Court of Appeals for the First Circuit was entered on January 10, 2008. Petitioner timely sought rehearing, which was denied on February 29, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

42 U.S.C. § 1981 provides:

> (a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens . . . .
>
> (b) For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

49 U.S.C. § 44902(b) provides:

> Subject to regulations of the Under Secretary, an air carrier, intrastate air carrier, or foreign air carrier may refuse to transport a passenger or property the carrier decides is, or might be, inimical to safety.

STATEMENT

A. Factual Background

Petitioner Cerqueira is an American citizen of Portuguese descent. Cerqueira has dark hair and an olive complexion, and he is often mistakenly perceived to be Middle Eastern. App. 257, 281.[1] On December 28, 2003, Cerqueira was a ticketed passenger scheduled to fly from Boston to Ft. Lauderdale on American flight 2237. The flight was the return portion of a round-trip ticket.

1. Removal from Flight

On the morning of his flight, Cerqueira went to the airport, checked a bag curbside, received his boarding pass, and proceeded to the gate, passing through the security checkpoint without incident. At the gate, Cerqueira requested a seat change to an exit row or bulkhead for more leg room. The American employee at the gate counter was flight attendant Sally Walling. Walling told Cerqueira that she could not help him and asked him to sit down and wait. Cerqueira followed Walling's instructions, and, once a gate agent arrived, Cerqueira was assigned seat number 20F, which was a window seat in an exit row. Cerqueira boarded when his group was called, found his seat, stowed his carry-on items, used the

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[1] "App." refers to the appendix filed with American's appellate brief.

lavatory, and then returned to his seat and began working on his laptop computer. App. 257-58.

About ten minutes after Cerqueira took his seat, two men, Mr. Ashmil and Mr. Rokah, boarded and sat next to Cerqueira in seats 20D and 20E. Cerqueira did not speak to them or interact with them in any way. Ashmil and Rokah, like Cerqueira, had dark hair and olive complexions. Ashmil and Rokah were speaking loudly to each other, partly in English and partly in a foreign language. Cerqueira later learned that Ashmil and Rokah are Israeli. When the announcement was made to turn off electronic devices, Cerqueira stowed his laptop and fell asleep. App. 259.

Cerqueira was awakened by Mr. Ynes Flores, a customer service manager for American. Flores asked all three men in the row for their boarding passes. Cerqueira was unable immediately to locate his boarding pass, but he handed Flores his itinerary, and Flores indicated that it was sufficient. Flores left with Cerqueira's itinerary and the boarding passes of Ashmil and Rokah. Soon after Flores left, four uniformed troopers from the Massachusetts State Police boarded the airplane and, without explanation, demanded that Cerqueira, Ashmil, and Rokah immediately deplane with their carry-on bags. It was a full flight, but only Cerqueira, Ashmil, and Rokah were removed. App. 259-60; App. 310. The three men were questioned by the police on the jet bridge, then escorted to a small room where they were held and interrogated for about two hours.

Cerqueira repeatedly told the police that he was traveling home, by himself, after a family visit for the holidays, and that he did not know Ashmil or Rokah. App. 260. The troopers determined that there was no security threat and cleared the three men for travel. App. 262, 382, 443; Stipulation S, Joint Pretrial Mem. [Doc. 57] at 15.

Capt. John Ehlers was the pilot of American Flight 2237, and he made the decision to have Cerqueira, Ashmil, and Rokah removed from the flight. App. 295. Ehlers claimed that he removed Cerqueira based on Walling's assertions that Cerqueira 1) requested a seat change in an insistent manner; 2) might have boarded early; and 3) used the lavatory. App. 300, 363. But Walling admitted that 1) she did not think her conversation with Cerqueira about the seat change was a security issue; 2) she did not hear the boarding announcements and thus did not know if Cerqueira had boarded out-of-turn; and 3) passengers often use the lavatory upon boarding. Walling further admitted that nothing she reported to Ehlers about Cerqueira ordinarily results in removal and denial of service. App. 366-70. Ehlers testified that he knew Walling was not in a position to know whether Cerqueira boarded early, and American made a judicial admission that "Mr. Cerqueira boarded the aircraft when his assigned group was called." App. 295. Ehlers also admitted that passengers commonly use the lavatory upon boarding and that the co-pilot

had checked the lavatory after Walling's report and found nothing wrong. App. 299-300.

Ehlers claimed that he removed Ashmil and Rokah from the flight because: 1) one of them had a conversation with Ehlers that Ehlers considered odd;[2] 2) Walling reported that they had wished other passengers a "happy new year" and were heard "speaking in a different language;" and 3) flight attendant Lois Sargent reported that they joked with her during the exit row briefing. It is undisputed that Cerqueira did not engage in any of these behaviors, and there was nothing that linked Cerqueira to Ashmil and Rokah other than his Middle Eastern appearance. Indeed, the flight attendants' trial testimony and written reports from the day of the incident showed that the flight attendants became concerned about the exit row passengers because of the flight attendants' perception that the three passengers were from the Middle East. Walling thought the three men looked similar because they were "dark," and, in her written report of the incident, she referred to the three passengers collectively as "them" and "they." App. 372, 428-30. Similarly, Sargent grouped the three men together

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[2]Ehlers testified that, in the terminal before the flight, a passenger with a ponytail—either Ashmil or Rokah—asked Ehlers if he was the pilot to Fort Lauderdale. When Ehlers confirmed that he was, Ashmil or Rokah said: "That's good. I'm going with you. We're going to have a good trip today." App. 296.

in her reports and wrote that they "seemed to be foreign nationals (later confirmed/Middle East passports)" and noted (incorrectly) that "these 3 passengers had Israeli passports but Arabic names." App. 431-33, 452-54. Flight attendant Amy Milenkovic testified that all three men had dark hair, and she thought that Ashmil or Rokah might be Middle Eastern. Her report noted that Ahmil or Rokah spoke with a "heavy accent," and she testified that since the terrorist attacks of September 11th, she has paid close attention to whether a passenger has an accent. App. 376-79, 434-36.

2. Denial of Rebooking

After the police completed their investigation and cleared Cerqueira, Ashmil, and Rokah, the police escorted the three men to the American ticket counter and expected that the three would be rebooked. App. 443. The police told the ticket agent that Cerqueira and the other two men were "all set to go" (App. 286; *see also* App. 382), and the ticket agent told Cerqueira that he could be accommodated on a flight from Boston to Ft. Lauderdale departing that afternoon, but she had to check with a supervisor. App. 262. The supervisor, customer service manager Nicole Traer, told Cerqueira that American was refunding the cost of the Boston to Ft. Lauderdale portion of his ticket, that American had made a corporate decision to deny him service, and that she had no further information. Traer told Cerqueira that if he wanted further information he should contact American directly. Traer was unable to tell

Cerqueira how long the denial of service would last. The next day, Cerqueira flew home on another airline. App. 263-64, 285-86.

The decision not to rebook Cerqueira on any American flight was made by Mr. Craig Marquis, the manager on duty at American's System Operations Control (SOC) in Dallas. Ehlers testified that, after the police removed Cerqueira, Ashmil, and Rokah from the flight, Ehlers called Marquis and reported the crew's concerns. App. 302. Marquis testified that, although he made the decision to deny rebooking, he has no recollection of the reasons for his decision or when the decision was made. An entry in Cerqueira's computerized Passenger Name Record notes that Cerqueira was denied boarding on Flight 2237 due to unspecified "security issues" and that Cerqueira should not be rebooked on American. App. 321-23, 423. The police were called to remove Cerqueira at about 7:00 am, but the first computer entry reflecting the decision to deny rebooking was not made until 9:01 am, by which time Cerqueira had been cleared by the police. App. 443.

B. Procedural Background

Cerqueira filed a complaint in the federal district court of Massachusetts alleging that, by removing him from his flight and refusing to rebook him after he was cleared by the police, American twice discriminated against him because of his perceived race or ethnicity in violation of 42 U.S.C. § 1981. American claimed that its treatment of Cerqueira was

justified by security concerns; Cerqueira maintained that but for his Middle Eastern appearance, he would not have been removed from his flight or refused further service.

The case was tried to a jury. After the close of evidence, the district court instructed the jury that "Mr. Cerqueira bears the burden of proving by a fair preponderance of the evidence that he was intentionally discriminated against because of the perception of his race or ethnicity" and that if American's treatment of Cerqueira was motivated by rational security concerns, the jury should find for American. App. 394. The court explained that in determining why American treated Cerqueira differently from other passengers, the jury should "consider that American Airlines is expected to operate its airlines with the primary goal of the safety and well-being of the traveling public." *Id.* The court further explained that

> [W]e expect of American Airlines that they're going to behave themselves in a way that puts the safety of the traveling public and their employees first. But they cannot, they're forbidden by the law from acting to discriminate—let's use that word—to discriminate against someone based upon their perception that that person is a certain race or a certain ethnic heritage. If that's why they did what they did, that's forbidden by the law.

Id.

The court reiterated this instruction in response to a jury question:

> In this case, if you believe that Mr. Cerqueira was treated differently, taken off the plane, denied rebooking, that may be perfectly all right because the airline, as I've already told you, has every right; has the duty to ensure the safety of the flying public and its own ground and air crews. . . . [The issue is] why? Why did they do it? There may be an appropriate motivation: safety, security of the flight; there may be an inappropriate, indeed illegal motivation because there's the perception that—of the person's race or ethnic background.

App. 412.

The district court also instructed the jury that a corporate defendant is vicariously liable for actions driven by the discriminatory animus of its employees. The court explained:

> Now, American Airlines is a company. . . . Companies are people and they're bureaucracies and they operate hierarchically; in other words, there are higher-ups in the company and lower down people. But all are employees of the company and they're—if you think they're acting within the scope of their employment and they're doing what they are doing as employees of American Airlines, then that conduct is attributed to American Air-

> lines. That is American Airlines. It's the sum total of the people that work for it.

App. 393-94.

The court instructed the jury to determine whether "American Airlines, through its agents, through the people who work for it, did they intentionally discriminate against Mr. Cerqueira on the basis of perceived race or ethnicity." App. 393. The court further explained:

> And let's say that's why a lower-level person acted as she did with respect to this. If that action is transformed into the action of the higher corporate people, if that's what drives the action of the higher corporate people, American's stuck with it because American should take care that they're not acting against a person based on the perceived race or ethnicity. The law forbids that.

App. 394; *see also* App. 397.

The jury returned a verdict for Cerqueira. App. 212. American filed two post-judgment motions: a renewed motion for judgment as a matter of law (App. 217) and a motion for a new trial (App. 221). The district court rejected all of American's arguments and concluded:

> This was a quintessential jury trial. Cerqueira and American were both ably represented by vigorous advocates and our system gave, as it ought, the final judgment on a difficult issue of

> racial discrimination to the trusted institution of collective wisdom—the jury. The jury spoke in favor of Cerqueira.

Pet. App. 62a.

American appealed and the First Circuit vacated the jury verdict and ordered that judgment be entered for American. The First Circuit held that the district court's *respondeat superior* instruction was reversible error because "[t]he biases of a non-decisionmaker may not be attributed to the decisionmakers" (Pet. App. 30a), and the removal decision would have to have been "*based only on the Captain's bias* toward persons who appeared to be of Middle Eastern descent" to result in liability (Pet. App. 37a) (emphasis added). The First Circuit also held that circumstantial evidence cannot be used to prove discrimination in an airline refusal-to-transport case because the *McDonnell Douglas* burden-shifting framework was developed in cases involving employment discrimination. Finally, the First Circuit concluded that the statutory discretion granted to airlines in 49 U.S.C. § 44902(b), to refuse to transport a passenger for safety reasons, creates a conflict between safety and civil rights and permits the use of racial profiling in airline denial-of-service decisions.

Cerqueira sought rehearing en banc, but his petition was denied by a three-to-two vote of the active judges of the First Circuit. Pet. App. 63a. The dissenting judges voiced strong disagreement with

the panel's opinion, especially as it relates to American's refusal to rebook Cerqueira on a later flight. Pet. App. 63a-73a (Torruella, J., and Lipez, J., dissenting from denial of reh'g en banc).

REASONS FOR GRANTING THE PETITION

I. The First Circuit's Rejection of Respondeat Superior Deepens an Already Intractable Conflict Among the Courts of Appeals on the Application of Agency Principles in Discrimination Cases.

The decision below deepens an entrenched conflict among the courts of appeals on the question of whether, and in what circumstances, a defendant is liable for discrimination if its decisionmaker relied on information tainted by a subordinate's discriminatory animus. In this case, the jury was presented with direct evidence that the flight attendants whose reports to Ehlers caused Cerqueira's removal were motivated by their perception that the exit row passengers were from the Middle East. Specifically, the evidence showed that the flight attendants thought Cerqueira was traveling with the other two men in his row solely because Cerqueira looked like them, and the flight attendants' written reports of the incident expressed their concerns about passengers with foreign appearances, Middle Eastern passports, Arabic names, and heavy accents. The district court instructed the jury that because a corporate defendant is vicariously liable for the acts of its employees acting within the scope of their

employment, American would be liable for discrimination if the decisions of Ehlers and Marquis were driven by the discriminatory animus of the flight attendants.

The First Circuit found that the district court erred by relying on the doctrine of respondeat superior because it "permitted liability of the air carrier to turn on the purported bias of non-decisionmakers." Pet App. 39a. According to the First Circuit, an air carrier cannot be liable for decisions that are driven by the discriminatory animus of subordinates; rather, the removal decision would have to be based only on the final decisionmakers' own bias to result in liability. As described immediately below, the First Circuit's wholesale rejection of the doctrine conflicts with the decisions of other courts that have considered the issue of subordinate bias liability, both generally and in the context of airline denial-of-service decisions. This Court should grant certiorari to resolve the conflict and provide guidance on this important issue.

Every circuit has recognized corporate liability based on respondeat superior, but there is an intractable conflict regarding the type or amount of influence a biased subordinate must exert over a decision to result in liability.[3] The Tenth Circuit examined

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[3]*See Cariglia v. Hertz Equip. Rental Corp.*, 363 F.3d 77, 83 (1st Cir. 2004) ("[C]orporate liability can attach if neutral

(continued...)

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[3](...continued)
decisionmakers . . . rely on information that is inaccurate, misleading, or incomplete because of another employee's discriminatory animus."); *Rose v. New York City Bd. of Educ.*, 257 F.3d 156, 161-62 (2d Cir. 2001) (finding liability where the biased subordinate "had enormous influence in the decision-making process"); *Abrams v. Lightolier Inc.*, 50 F.3d 1204, 1214 (3d Cir. 1995) (finding liability if the biased subordinate played a role or participated in the decision at issue) ("Indeed, we have held that discriminatory comments by nondecisionmakers . . . may properly be used to build a circumstantial case of discrimination.") (citing *Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43, 54 (3d Cir. 1989)); *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 290-91 (4th Cir. 2004) (finding liability when biased subordinate "possessed such authority as to be viewed as the one principally responsible for the decision"); *Laxton v. Gap, Inc.*, 333 F.3d 572, 584 (5th Cir. 2003) (finding liability if the biased subordinate had influence or leverage over the official decisionmaker); *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 354-55 (6th Cir. 1998) (finding liability if a subordinate's discriminatory bias influenced or "played a meaningful role in the decision"); *Brewer v. Bd. of Trs.*, 479 F.3d 908, 917-18 (7th Cir. 2007) (finding liability when a subordinate with discriminatory animus exerts significant influence and is tantamount to being a functional decisionmaker); *Stacks v. S.W. Bell Yellow Pages, Inc.*, 27 F.3d 1316, 1323 (8th Cir. 1994) (finding liability when the facts on which the decisonmakers rely have been filtered by a subordinate exhibiting discriminatory aminus); *Bergene v. Salt River Project Agric. Improvement & Power Dist.*, 272 F.3d 1136, 1141 (9th Cir. 2001) (finding liability if a subordinate with a retaliatory or discriminatory motive is involved in the challenged decision); *EEOC v. BCI Coca-Cola Bottling Co.*, 450 F.3d 476, 487-88 (10th Cir. 2006) ("To prevail on a subordinate

(continued...)

this circuit conflict in *EEOC v. BCI Coca-Cola Bottling Co.*, 450 F.3d at 486-87. The Tenth Circuit rejected both the "lenient approach" of courts that have imposed liability where a biased subordinate had influence over the decisionmaker, *id.* at 486 (citing, among other cases, *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 227 (5th Cir. 2000)), and the "strict approach" of courts that require a subordinate to have controlled the decision, *id.* at 487 (citing, among other cases, *Hill*, 354 F.3d at 291), and held that liability attaches if the information provided by the biased subordinate "caused" the adverse action. *Id.* (expressing agreement with *Lust v. Sealy, Inc.*, 383 F.3d 580, 584 (7th Cir. 2004)). To resolve the circuit conflict regarding the standard for subordinate bias liability, this Court granted certiorari in *BCI Coca-Cola Bottling Co. v. EEOC*, 127 S. Ct. 852 (2007), but the case was dismissed on petitioner's motion under Rule 46.2 of the Rules of this Court. 127 S. Ct. 1931 (2007). The Court should grant certiorari in this case to resolve the ongoing conflict

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[3](...continued)
bias claim, a plaintiff must establish more than mere 'influence' or 'input' in the decisionmaking process. Rather, the issue is whether the biased subordinate's discriminatory reports, recommendation, or other actions caused the adverse [] action."); *Llampallas v. Mini-Circuits, Lab, Inc.*, 163 F.3d 1236, 1249 (11th Cir. 1998) (finding liability if a biased subordinate manipulates the decisionmaker); *Griffin v. Wash. Convention Ctr.*, 142 F.3d 1308, 1312 (D.C. Cir. 1998) (finding liability "where the ultimate decision maker is not insulated from the subordinate's influence.").

among the courts of appeals regarding the circumstances under which a corporate defendant is liable under federal anti-discrimination laws based on a subordinate's discriminatory animus.

Further, the First Circuit's rejection of respondeat superior liability outside of the employment context, *see* Pet. App. 41a (limiting the application of the First Circuit's earlier decision in *Cariglia*, 363 F.3d at 87-88, to employment discrimination claims), puts the decision below in direct conflict with the Fifth, Sixth, and Eighth Circuits, all of which have applied respondeat superior to claims of discrimination in activities other than employment. *See Green v. Dillard's, Inc.*, 483 F.3d 533, 540 (8th Cir. 2007) (holding that retailer can be vicariously liable under § 1981 for the discriminatory acts of its employees); *Christian v. Wal-Mart Stores, Inc.*, 252 F.3d 862, 876-78 (6th Cir. 2001) (finding that retailer could be liable under § 1981 even where decisionmaker was unaware of plaintiff's race if lower-level employee's racial animus influenced the decision); *Arguello v. Conoco, Inc.*, 207 F.3d 803, 810-11 (5th Cir. 2000) (holding that corporate defendant in a public accommodations case under § 1981 could be vicariously liable for the discriminatory actions of a non-supervisory employee). This Court should grant certiorari to resolve the conflict.

Even if limited to airline denial-of-service cases, the decision below conflicts with decisions of other courts. The First Circuit's rejection of respondeat superior where a pilot's removal decision is based on

a flight attendant's bias rests on the court's recognition that a pilot may have to act quickly and without opportunity to conduct the independent investigation that would otherwise break the causal chain between the subordinate's animus and the removal decision. *See, e.g., BCI Coca-Cola Bottling Co.*, 450 F.3d at 488 ("[B]ecause a plaintiff must demonstrate that the actions of the biased subordinate caused the [adverse] action, a [defendant] can avoid liability by conducting an independent investigation of the allegations" because, as a result of such investigation, the defendant "has taken care not to rely exclusively on the say-so of the biased subordinate, and the causal link is defeated."). Thus, the First Circuit's rejection of respondeat superior was based on its holding that "[t]he Captain (or other decisionmaker) is entitled to accept at face value the representations made to him by other air carrier employees," even if those representations are false and motivated by bias. Pet. App. 30a. Several other courts have also held that a pilot is entitled to rely without further inquiry on information provided by a crew member despite any exaggerations or false representations. *See, e.g., Ruta v. Delta Airlines, Inc.*, 322 F. Supp. 2d 391, 397-98 (S.D.N.Y. 2004); *Al-Qudhai'een v. Am. W. Airlines, Inc.*, 267 F. Supp. 2d 841, 848 (S.D. Ohio 2003); *Christel v. AMR Corp.*, 222 F. Supp. 2d 335, 340 (E.D.N.Y. 2002). These decisions conflict with the decision of the Ninth Circuit in *Cordero v. Cia Mexicana De Aviacion, S.A.*, 681 F.2d 669, 672 (9th Cir. 1982), and the position of the U.S. Department of Transportation (DOT).

In *Cordero*, a pilot excluded a passenger based on a flight attendant's report that the passenger had uttered an obscenity and had raised his arm as if to strike the flight attendant. *Id.* at 671. The passenger claimed that he was the victim of mistaken identity, and the airline was held liable. Although the Ninth Circuit found that the pilot had "no duty to conduct an *in-depth* investigation," it concluded that the airline acted unreasonably in excluding the passenger "without even the most cursory inquiry into the complaint against him." *Id.* at 672 (emphasis added). Thus, the First Circuit's conclusion that an airline's decisionmaker has no duty to conduct any inquiry into a subordinate's report has created a split with the Ninth Circuit that should be resolved by this Court.

Moreover, the decision below conflicts with DOT's position on the issue. DOT brought an enforcement action against American based on eleven separate instances in which American unlawfully discriminated against passengers perceived to be of Arab, Middle Eastern, or South Asian descent by either removing them from flights or denying them boarding. The enforcement action was resolved by entry of a Consent Order finding that American acted in a manner inconsistent with the requirements of federal civil rights law. As noted in the Consent Order, DOT "strongly disagrees" with American's assertion "that the pilot-in-command may rely without further inquiry upon the representations of other crewmembers," and DOT maintains

that "a pilot-in-command's failure to inquire independently into the reasons for such action is inconsistent with carriers' legal obligations." App. 456.

This case presents an excellent vehicle for this Court to define the circumstances under which an airline is liable for discrimination where the formal decisionmakers acted on information tainted by the animus of lower-level employees, because the facts demonstrate the incongruity of applying blanket immunity to all such decisions. Immunity for pilot decisions to remove a passenger without further inquiry based on crewmember reports should be limited to situations where 1) the report of the biased subordinate—if true—would justify the pilot's removal decision, and 2) time constraints or security considerations prevent the pilot from making further inquiry. Neither circumstance is present here. First, the information reported to Ehlers by the flight attendants was insufficient on its face to support the removal decision because the flight attendants did not report that Cerqueira had engaged in any behavior that was irregular, threatening, or unusual. Rather, the flight attendants reported that Cerqueira had engaged only in common passenger behavior that does not ordinarily result in denial of service. Second, in this case, Ehlers had ample time to verify that Cerqueira posed no threat to safety. Cerqueira's flight departed about three hours late and only after the police had concluded their investigation and cleared Cerqueira for travel.

Finally, as explained in the dissents from denial of rehearing en banc, there was no imperative for Marquis, the SOC manager, to make a decision to deny rebooking without further inquiry into the situation. Marquis had none of the time constraints or security considerations that might prevent a pilot from inquiring into the basis for crewmember reports. Rather, Marquis made his decision "without time pressure and with the benefit of additional information afforded by the police investigation." Pet. App. 66a (Torruella, J., dissenting from denial of reh'g en banc). Thus, although it may be reasonable in some circumstances to "remove any responsibility on the part of the Captain to conduct an inquiry into representations made by other air carrier employees, there is no convincing rationale for extending that consideration to decisionmakers such as the SOC manager who are not compelled by exigent circumstances." *Id.* at 69a; *see also id.* at 73a (Lipez, J., dissenting from denial of reh'g en banc) ("While the law affords the Captain great latitude because his decision must be made quickly, the SOC manager—and American Airlines as a whole—is not entitled to piggyback on that first decision and thereby multiply any discriminatory animus underlying it.").

II. The First Circuit's Bar On Use of Indirect Evidence to Prove Discrimination in Activities Other than Employment Conflicts with the Decisions of Other Courts of Appeals.

It is well-settled that a plaintiff can prove employment discrimination using indirect evidence under the burden-shifting framework articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-804 (1973), and refined in *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981). Under *McDonnell Douglas*, the plaintiff bears the initial burden of establishing a prima facie case of discrimination. Establishment of a prima facie case creates a presumption of unlawful discrimination, and the burden of production then shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the challenged act. If the defendant fails to carry its burden, the plaintiff is entitled to judgment as a matter of law. If the defendant meets its burden of production, the plaintiff must prove that the reasons proffered by the defendant are a pretext for discrimination. The burden of persuasion remains at all times with the plaintiff. *Id.*

In the decision below, the First Circuit held that circumstantial evidence cannot be used to prove discrimination in a refusal-to-transport case because the *McDonnell Douglas* framework was developed in cases involving employment discrimination. Pet. App. 38a-39a. This holding conflicts with the decisions of numerous other federal courts of appeals

that have used the *McDonnell Douglas* framework in cases alleging discrimination in activities other than employment.[4]

For example, in *Lindsay v. Yates*, 498 F.3d 434, 438 (6th Cir. 2007), the Sixth Circuit held that "[t]he familiar *McDonnell Douglas/Burdine* analysis applies to federal housing-discrimination claims, whether they are brought under the [Fair Housing Act (FHA)] or 42 U.S.C. §§ 1981 or 1982." The Ninth Circuit has applied the framework to a retaliation claim under the FHA, *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1061-63 (9th Cir. 2004), and the framework has been applied in cases alleging discrimination in contracting for event space, *Lindsey v. SLT Los Angeles, LLC*, 447 F.3d 1138, 1144-45 (9th Cir. 2006), and leasing of commercial space. *Chauhan v. M. Alfieri Co., Inc.*, 897 F.2d 123, 126-27 (3d Cir. 1990). The Seventh Circuit has applied *McDonnell Douglas* burden-shifting to a claim of discriminatory application of a

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[4]The district court instructed the jury that Cerqueira had the burden of showing "by a fair preponderance of the evidence that he was intentionally discriminated against because of the perception of his race or ethnicity." App. 394. The First Circuit found that the district court erred by instructing the jury "that American Airlines had the ultimate burden of showing that its reasons for removing the plaintiff were legitimate" (Pet. App. 35a), but the instruction the First Circuit quotes was a mixed-motive instruction that closely tracked the instruction approved by this Court in *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 96-97 (2003). American never objected to the mixed-motive instruction, and it was not an issue on appeal.

franchise agreement, *Elkhatib v. Dunkin Donuts, Inc.*, 493 F.3d 827, 829 (7th Cir. 2007), and a case alleging a discriminatory refusal to sell a medical practice. *Sanghvi v. St. Catherine's Hosp., Inc.*, 258 F.3d 570, 577 (7th Cir. 2001). Several courts have applied the framework to claims of discrimination in retail transactions, *see, e.g., Williams v. Staples, Inc.*, 372 F.3d 662, 667 (4th Cir. 2004); *Christian*, 252 F.3d at 868, including a claim of discrimination in food delivery. *Kinnon v. Arcoub, Gopman & Assocs., Inc.*, 490 F.3d 886, 893 (11th Cir. 2007). It has been used to assess the evidence in cases involving discrimination in competitive bidding, *Harris v. Hays*, 452 F.3d 714, 717-18 (8th Cir. 2006), hotel accommodations, *Murrell v. Ocean Mecca Motel, Inc.*, 262 F.3d 253, 257 (4th Cir. 2001), and education. *Williams v. Lindenwood Univ.*, 288 F.3d 349, 355 (8th Cir. 2002) (discrimination in expulsion from University); *Gant ex. rel. Gant v. Wallingford Bd. of Educ.*, 195 F.3d 134, 146 (2d Cir. 1999) (discriminatory transfer from first grade to kindergarten). Indeed, on at least two occasions, the First Circuit has applied the burden-shifting framework in cases alleging discrimination outside the employment context. *See Mercado-Garcia v. Ponce Fed. Bank*, 979 F.2d 890, 893 (1st Cir. 1992) (applying the framework to claim of age discrimination in credit decision); *T & S Serv. Assocs., Inc. v. Crenson*, 666 F.2d 722, 724 (1st Cir. 1981) ("Though developed in the context of Title VII . . . , this procedural technique 'is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination.'")

(quoting *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978); *see also Loeb v. Textron, Inc.*, 600 F.2d 1003, 1015 (1st Cir. 1979) (noting that "*McDonnell Douglas* meets a problem of proof that may be present in any case where motivation is in issue.").

Even if the First Circuit's rejection of the *McDonnell Douglas* framework is limited to airline denial-of-service cases, the decision below conflicts with decisions of several other federal courts. The First Circuit acknowledged that its decision conflicts with *Dasrath v. Continental Airlines, Inc.*, 467 F. Supp. 2d 431, 445 (D.N.J. 2006). Pet. App. 39a n. 21 ("The district court in *Dasrath* . . . did use the *McDonnell Douglas* model, in our view incorrectly."). It conflicts with several other decisions as well. *See Simmons v. American Airlines*, 34 Fed. Appx. 573, 575-76 (9th Cir. 2002) (unpublished); *Thompson v. Southwest Airlines Co.*, No. 04-313, 2006 WL 287850, *5 (D.N.H. Feb. 6, 2006) (unpublished); *Huggar v. Northwest Airlines, Inc.*, No. 98-594, 1999 WL 59841, *3-4 (N.D. Ill. Jan. 27, 1999) (unpublished).

Although the First Circuit's rejection of the *McDonnell Douglas* framework is contrary to the weight of appellate authority, we acknowledge that the application of *McDonnell Douglas* outside the employment context has been a source of confusion for a number of other courts. For example, in *Christian v. Wal-Mart Stores*, the Sixth Circuit overturned a district court decision that omitted the traditional *McDonnell Douglas* framework from its analysis of a claim of discrimination in a retail establishment. 252

F.3d at 868. The Sixth Circuit noted that the district court had used an alternative three-part test fashioned by the Second Circuit and subsequently adopted by the Fifth, Seventh, and Tenth Circuits, which required the plaintiff to demonstrate an intent to discriminate rather than establish facts that, if unexplained, would support an inference of discrimination. *Id.* (citing *Mian v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 7 F.3d 1085, 1087 (2d Cir. 1993); *Green v. State Bar of Texas*, 27 F.3d 1083, 1086 (5th Cir. 1994); *Morris v. Office Max, Inc.*, 89 F.3d 411, 413 (7th Cir. 1996); *Hampton v. Dillard Dep't Stores, Inc.*, 247 F.3d 1091 (10th Cir. 2001)). The Sixth Circuit rejected the alternative test used by those courts because "it propagates the false notion that a plaintiff must provide direct evidence of the defendant's 'intent to discriminate'" and "would turn the purpose of the prima facie case on its head[.]" *Id.* at 872. *But see Bellows v. Amoco Oil Co.*, 118 F.3d 268, 274 (5th Cir. 1997) ("The plaintiff may establish a prima facie case by direct evidence or, more commonly, by circumstantial evidence of discriminatory motive."); *Daniels v. Advantage Rent-A-Car Inc.*, 80 Fed. Appx. 936, 940 n. 4 (5th Cir. 2003) (unpublished) (assuming, but not deciding, that the *McDonnell Douglas* framework applies outside the employment context). Further, the Seventh, First, and D.C. Circuit have split on whether *McDonnell Douglas* applies to credit discrimination cases. *Compare Latimore v. Citibank Fed. Sav. Bank*, 151 F.3d 712, 714 (7th Cir. 1998) *with Mercado-Garcia*, 979 F.2d at 893, *and Crawford v. Signet Bank*, 179 F.3d 926, 928-29 n.5 (D.C. Cir. 1999)

(applying *McDonnell Douglas* to mortgage discrimination claim under § 1981 and acknowledging split with the Seventh Circuit).

This Court has applied the *McDonnell Douglas* framework in employment discrimination cases brought under statutes other than Title VII, *see Patterson v. McLean Credit Union*, 491 U.S. 164, 186 (1989) (applying framework to employment discrimination claim under § 1981), *superseded on other grounds by* 42 U.S.C. § 1981(b) (enlarging the category of conduct subject to § 1981 liability); *see also Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142 (2000) ("[W]e shall assume, *arguendo*, that the *McDonnell Douglas* framework is fully applicable" to claims under the Age Discrimination in Employment Act (ADEA)); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 n.1 (1993) ("[W]e shall assume that the *McDonnell Douglas* framework is fully applicable to racial-discrimination-in-employment claims under 42 U.S.C. § 1983."), but it has not addressed whether the model may be used outside the employment context. The Court should grant certiorari to provide guidance on this important issue.

This case is a particularly good vehicle for addressing the issue because it presents two separate claims of discrimination that would be resolved under different prongs of the *McDonnell Douglas* framework. With respect to Ehlers's decision to remove Cerqueira from flight 2237, American articulated a non-discriminatory reason—that Cerqueira's

behavior as reported by Walling raised security concerns—but the jury rejected that explanation as pretext and found that discrimination was the true motivation. The jury was entitled to disbelieve Ehlers's proffered explanation and infer discrimination because the evidence showed that Cerqueira did not engage in any behavior that is uncommon or that ordinarily results in denial of service. Further, Ehlers lacked credibility in general because his testimony was often at odds with that of other American Airlines employees, his own deposition testimony, and American's judicial admissions.[5] But

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[5]For example, Ehlers claimed that he did not see Cerqueira before deciding to have him removed from the flight (App. 312), but Ehlers's testimony was directly contradicted by that of two other airline employees who testified that, on two separate occasions, Ehlers pointed out the passengers in the exit row. App. 326, 334. When confronted with that testimony, Ehlers testified that he "may or may not have done that." App. 301. Similarly, Ehlers testified at trial that Walling had reported that the exit row passengers were "staring" at the flight attendants, but Ehlers never mentioned this at his deposition despite repeated inquiries (App. 315-16), and Walling did not claim to have made such a report. Indeed, Ehlers admitted at trial that several elements of his testimony had changed since the time of his deposition. App. 320. Ehlers also denied that he made the decision to have Cerqueira removed from flight 2237 (App. 317), but American made a judicial admission that he did (App. 295). Ehlers also testified that his only interaction with Ashmil or Rokah was in the terminal and that he did not notice an accent. App. 297. But Flight Attendant Milenkovic testified that Ashmil or

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because the court below held that Cerqueira could prove discrimination only by presenting direct evidence of Ehlers's discriminatory animus, the jury's disbelief of Ehlers's explanation was rendered irrelevant.

With regard to American's refusal to rebook Cerqueira on any other flight even after he was cleared for travel by the police, American was unable to articulate any specific explanation for its decision.[6] Marquis testified that he has no recollection of the reasons for his decision, and an entry in Cerqueira's computerized Passenger Name Record states only that Cerqueira was denied boarding on Flight 2237 due to unspecified "security issues" and should not be rebooked. App. 321-23, 423. As explained by this Court in *Burdine*, American's silence in the face of Cerqueira's prima facie case "requires judgment for the plaintiff because no issue of fact remains in the

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[5](...continued)
Rokah spoke to Ehlers onboard the airplane, in the presence of Milenkovic, and that the passenger spoke with a heavy accent. App. 377.

[6]There is no evidence that the decision to deny rebooking was made "within minutes" of the decision to have Cerqueira removed for questioning and for the same reasons, as the First Circuit apparently believed. *See* Pet. App. 4a, 36a, 37a. The police were called to remove Cerqueira at about 7:00 am, but the first computer entry reflecting the decision to deny rebooking was not made until 9:01 am, by which time Cerqueira had been cleared by the police. *See* Pet. App. 17a, 69a n.2; App. 443.

case." 450 U.S. at 254; *accord St. Mary's Honor Ctr.*, 509 U.S. at 509-10. But by rejecting the *McDonnell Douglas* framework, the court below has made silence a defense in any case where the plaintiff lacks direct evidence. That holding alone warrants this Court's review.

III. This Case Presents Important Issues at the Intersection of Aviation Security and Civil Rights that Should be Settled by This Court.

A. The First Circuit's conclusion that safety must be prioritized over nondiscrimination conflicts with the decisions of other federal courts.

The permissive refusal provision of the Federal Aviation Act (FAA) provides that an "air carrier may refuse to transport a passenger or property the carrier decides is, or might be, inimical to safety." 49 U.S.C. § 44902(b). The Act does not set forth a standard to assess whether an airline's refusal-to-transport decision is protected by § 44902(b), but the courts that have addressed the issue, including the courts below, have applied the arbitrary or capricious standard articulated by the Second Circuit in *Williams v. Trans World Airlines*, 509 F.2d 942, 948 (2d Cir. 1975) (holding that denial-of-service decisions are protected if "rational and reasonable and not capricious or arbitrary").[7] *See* Pet. App. 27a

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[7] *Williams* involved the interpretation of 49 U.S.C. § 1511(a), (continued...)

("We agree with *Williams* and hold that an air carrier's decisions to refuse transport under § 44902(b) are not subject to liability unless the decision is arbitrary or capricious."); *Cordero*, 681 F.2d at 672 ("We believe there are persuasive reasons for adopting the *Williams* test."); Pet App. 45a ("Despite the lack of explicit statutory or controlling legal guidance, this Court is convinced by the weight of persuasive authority that the 'arbitrary and capricious' standard does in fact apply.") (citations omitted). Although the First Circuit correctly recognized that § 44902(b) does not protect decisions that are arbitrary or capricious, it rejected the district court's conclusion that a jury verdict based on a finding of intentional discrimination on account of race necessarily satisfies the arbitrary or capricious standard. Pet. App. 36a.

The First Circuit's rejection of the principle that decisions driven by racial animus are *per se* arbitrary and capricious creates a direct conflict with the decisions of several other federal courts. *See Shqeirat v. U.S. Airways, Inc.*, 515 F. Supp. 2d 984, 1004 (D. Minn. 2007) ("[A] refusal to board a passenger that is motivated by a passenger's race is inherently arbitrary and capricious."); *Dasrath*, 467 F. Supp. 2d at 434 ("A decision based on race would be arbitrary and capricious."); *Alshrafi v. American Airlines, Inc.*, 321 F. Supp. 2d 150, 162 (D. Mass. 2004)

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[7](...continued)
the predecessor to § 44902(b).

("[A]ctions motivated by racial or religious animus are necessarily arbitrary and capricious, and therefore beyond the scope of the discretion granted by Section 44902."); *Bayaa v. United Airlines, Inc.*, 249 F. Supp. 2d 1198, 1205 (C.D. Cal. 2002) (finding "no merit" to airline's argument that civil rights laws conflict with § 44902(b) and holding that § 44902(b) "does not grant [the airline] a license to discriminate"); *Chowdhury v. Northwest Airlines Corp.*, 238 F. Supp. 2d 1153, 1154 (N.D. Cal. 2002) ("[T]here is no apparent conflict between the federal statutes prohibiting racial discrimination and the federal law giving air carriers the discretion to refuse to carry passengers for safety reasons.").

Further, the First Circuit's conclusion that statutes protecting passengers from discrimination are subordinate to an airline's refusal rights under § 44902(b) is inconsistent with the Second Circuit's decision in *Williams* and the Ninth Circuit's decision in *Cordero*. In *Williams*, an airline denied service to a ticketed passenger whom the FBI reported was a dangerous fugitive known to carry firearms and who had been diagnosed as schizophrenic. 509 F.2d at 945. The passenger sued the airline alleging discrimination. The Second Circuit held that the airline's denial-of-service decision was protected by the permissive refusal provision of the FAA because the airline had a reasonable basis for its decision, and there was "no evidence that [the airline] was at any time influenced by race prejudice or discrimination in the slightest." *Id.* at 948. Thus, *Williams* does not

stand for the principle that anti-discrimination law is limited by § 44902(b); rather, *Williams* holds that where an airline acts "properly and reasonably" in denying service, the passenger will not be able to prove that discrimination motivated the airline's decision. *Id.* at 949. Likewise, if the passenger proves that discrimination motivated the decision, the decision will be arbitrary and capricious and the protection afforded by § 44902(b) for safety-related denials of service will not apply. The Ninth Circuit reached the same conclusion in *Cordero*, holding that the permissive refusal provision of the FAA does not "render[] immune from liability a carrier whose decision to deny passage is unreasonably or irrationally formed. While we agree with the district court that air safety is a paramount concern of air carriers and of the public generally, we do not believe that requiring carriers to act reasonably in formulating opinions to deny passage undercuts this concern." 681 F.2d at 671.[8]

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[8]The First Circuit claims agreement "with *Williams* that Congress did not intend the non-discrimination provisions of the FAA or of § 1981 to limit or to render inoperative the refusal rights of the air carrier" Pet. App. 28a (citing *Williams*, 509 F.2d at 948), but ignores the qualification in *Williams* that non-discrimination law does not limit refusal rights "in the face of evidence which would cause a reasonably careful or prudent carrier of passengers to form the opinion that the presence aboard a plane of the passenger-applicant 'would or might be inimical to safety of the flight.'" 509 F.2d at 948 (quoting the predecessor statute to § 44902(b)). *Cordero*

(continued...)

Because the First Circuit concluded that § 44902(b) can protect an airline's denial-of-service decision even where the decision violates anti-discrimination law, the decision below conflicts with the Second Circuit's decision in *Williams*, the Ninth Circuit's decision in *Cordero*, and the district court decisions in *Shqeirat*, *Dasrath*, *Alshrafi*, *Bayaa*, and *Chowdhury*. This Court should grant certiorari to resolve this conflict.

B. The decision below effectively endorses racial profiling.

This Court should also review the decision below because its rejection of the principle that decisions driven by racial stereotypes are irrational is an endorsement of racial profiling in airline denial-of-service decisions. Indeed, the First Circuit's original slip opinion stated explicitly that "[r]ace or ethnic origin of a passenger may, depending on context, be relevant information in the total mix of information raising concerns that transport of a passenger 'might be' inimical to safety." Slip. Op. of Jan. 10, 2008, at 38. The First Circuit later issued an Errata Sheet that eliminated this statement (Pet. App. 77a), but the First Circuit's conclusion that racial profiling is

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[8](...continued)
expressed the same principle this way: "We have not found, nor have we been shown, any legislative history indicating that in enacting [§ 44902(b)] Congress intended to limit the protections afforded ticket-holders under" anti-discrimination law. 681 F.2d at 672.

a legitimate security measure is implicit in its amended opinion. Although the court below agreed that "a reasonable decision is not arbitrary or capricious" and "a decision which is arbitrary is totally devoid of reason" (Pet App. 28a n.17 (citing *Williams* and *Cordero*)), it held that denial-of-service decisions based on race are not necessarily arbitrary or capricious. Pet. App. 36a (rejecting district court's reasoning that the "instruction on finding intentional discrimination was adequate to cover § 44902(b), because if there was intentional discrimination . . . that would itself per se be arbitrary or capricious."). Thus, the opinion below protects airline denial-of-service decisions that are based on stereotypes about the propensity of passengers with a Middle Eastern appearance to commit acts of terrorism.

By allowing racial profiling in airline denial-of-service decisions, the First Circuit goes further than courts that have sanctioned the use of race in investigative decisions where race is part of a description of a particular suspect, *see, e.g., Brown v. City of Oneonta*, 221 F.3d 329, 337-38 (2d Cir. 2000) (distinguishing between permissible use of race to identify suspect based on witness description and unlawful profiling based on racial stereotype); *United States v. Avery*, 137 F.3d 343, 353 (6th Cir. 1997) (holding that "the Fourteenth Amendment protects citizens from police action, including the decision to interview an airport patron, based solely on impermissible racial considerations"); *Buffkins v. City of Omaha*, 922 F.2d

465, 468 n.8 (8th Cir. 1990) (holding that detention of airport patron was not racial discrimination under § 1981 because she matched the racial description of the person described in a tip, but noting that its "conclusion would be very different if the officers, acting without a tip, focused their investigation on Buffkins solely because of her race."), and the First Circuit's opinion is in tension with this Court's rejection of racial stereotyping. *See, e.g., Shaw v. Reno,* 509 U.S. 630, 643-44 (1993); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 630-31 (1991); *Batson v. Kentucky*, 476 U.S. 79, 85-88 (1986).

Nevertheless, the First Circuit is not alone. Since the terrorist attacks of September 11, 2001, many commentators have endorsed racial profiling as a tool in the fight against terrorism. *See, e.g.*, R. Richard Banks, *Racial Profiling and Antiterrorism Efforts*, 89 Cornell L. Rev. 1201 (2004) (describing disagreement among commentators on legitimacy of racial profiling in antiterrorism efforts); Stephen J. Ellman, *Racial Profiling and Terrorism*, 19 N.Y.L. Sch. J. Hum. Rts. 305 (2003) (discussing whether racial profiling is justifiable as a response to terrorism).

The debate over the legality of racial profiling in aviation is an issue that will continue to arise with frequency and should be addressed by this Court. Indeed, DOT's Aviation Consumer Protection Division reports that, between January 1, 2001 and March 31, 2008, it received 953 complaints of discrim-

ination against U.S. airlines.[9] Further, in the months following the terrorist attacks of September 11, 2001, DOT's Office of Aviation Enforcement and Proceedings received numerous complaints alleging that airlines had unlawfully discriminated against passengers perceived to be of Arab, Middle Eastern, or South Asian descent by either removing them from flights or denying them boarding. These complaints resulted in administrative enforcement actions against four major air carriers, each of which was resolved by the entry of a Consent Order.[10] As these Consent Orders illustrate, this case presents issues

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[9]*See* Air Travel Consumer Reports published by U.S. Department of Transportation, Office of Aviation Enforcement and Proceedings, Aviation Consumer Protection Division, on February 2002, February 2003, February 2004, February 2005, February 2006, February 2007, February 2008, and May 2008, http://airconsumer.ost.dot.gov/reports/index.htm.

[10]*American Airlines, Inc.*, No. OST-2003-15046, Consent Order (DOT Feb. 27, 2004), http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=DOT-OST-2003-15046.; *Delta Airlines, Inc.*, No. OST-2004-16943, Consent Order (DOT June 21, 2004), http://www.regulations.gov/fdmspublic/component/main?main=Document/Detail&o=090000648031aaea; *Continental Airlines, Inc.*, No. OST-2004-16943, Consent Order (DOT Apr. 2, 2004), http://www.regulations.gov/fdmspublic/component/main?main=DocumentDetail&o=090000648031aade; *United Air Lines, Inc.*, No. OST-2003-14194, Consent Order (DOT Nov. 19, 2003), http://www.regulations.gov/fdmspublic/component/main?main=DocumentDetail&o=090000648030df3f.

"of exceptional importance . . . in light of the high-security environs in which we find ourselves today" (Pet. App. 64a (Torruella, J., dissenting from denial of reh'g en banc)), and the Nation's longstanding commitment to nondiscrimination in all walks of American life. The Court should grant review for that reason as well.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Michael T. Kirkpatrick
Counsel of Record
Public Citizen Litigation Group
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

David S. Godkin
Birnbaum & Godkin, LLP
280 Summer Street
Boston, MA 02210
(617) 307-6100

May 2008

Counsel for Petitioner

United States Court of Appeals
For the First Circuit

No. 07-1824

JOHN D. CERQUEIRA,

Plaintiff, Appellee,

v.

AMERICAN AIRLINES, INC.,

Defendant, Appellant.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS

[Hon. William G. Young, U.S. District Judge]

Before

Lynch, Circuit Judge,
Campbell and Stahl, Senior Circuit Judges.

Michael V. Powell with whom Michael A. Fitzhugh, Fitzhugh, Parker & Alvaro LLP and Locke Liddell & Sapp LLP were on brief for appellant.

Wayne A. Schrader, David A. Berg, Katherine Andrus, Air Transport Association of America, Inc., Jason B. Stavers and Gibson Dunn & Crutcher L.L.P. were on brief for Air Transport Association of America, Inc., amicus curiae.

Michael T. Kirkpatrick with whom Public Citizen Litigation Group, David S. Godkin, Darleen F. Cantelo and Birnbaum & Godkin, LLP were on brief for appellee.

Michael L. Foreman, Monica R. Saxena, Nicole Birch, Lawyers' Committee for Civil Rights Under Law, Vincent A. Eng, Aimee J. Baldillo, Asian American Justice Center, Cynthia Valenzuela, The Mexican American Legal Defense & Educational Fund, Angela Ciccolo, Anson Asaka, NAACP, Foster Maer and Puerto Rican Legal Defense Fund were on brief for Lawyers' Committee for Civil Rights Under Law, Asian American Justice Center, Mexican American Legal Defense & Educational Fund, National Association for the Advancement of Colored People, and Puerto Rican Legal Defense Fund, amici curiae.

January 10, 2008

LYNCH, Circuit Judge. An airline passenger, John Cerqueira, filed suit asserting that his removal

from a flight violated his rights under 42 U.S.C. § 1981 to be free of race discrimination in contracting. He recovered compensatory damages of $130,000 and punitive damages of $270,000 against American Airlines ("American" or "AA"), which on December 28, 2003, refused to transport Cerqueira on a flight and to rebook him on another flight. His discrimination claim was made against the statutory permission granted to airlines, in 49 U.S.C. § 44902(b), to refuse to transport a passenger "the carrier decides is, or might be, inimical to safety." The issues raised are of first impression in this circuit.

The district court failed to instruct the jury on the statutory permission to air carriers to remove passengers under § 44902(b); it also gave instructions inconsistent with that statute and which were otherwise in error. We thus vacate the jury verdict in favor of the plaintiff.

We also conclude that no properly instructed jury could return a verdict against the air carrier and therefore the district court should have granted American Airlines's motion for judgment notwithstanding the verdict. We remand with instructions to enter judgment for American Airlines.

I.

The facts of this case center on AA Flight 2237, scheduled to fly from Boston's Logan Airport to Fort Lauderdale, Florida on December 28, 2003.

We recite the facts from particular perspectives: that of the Captain of the aircraft and of the person who within minutes that same morning decided not to rebook the plaintiff, based on the information known to them. We explain below why the law compels this perspective. The exact sequence of events is not entirely clear from the record; however, the information described was known in full detail to the Captain when he made the decision not to transport the plaintiff and in summary to the other decisionmaker. There is no material dispute of facts about the information before the decisionmakers.

A. Removal from Flight

The Captain of AA Flight 2237 has worked for AA since 1986, starting as a flight engineer; in 1988, he became an FAA-designated instructor; around 1989, he was promoted to co-pilot; and in 1996, he was promoted to the position of Captain. He testified that he has flown hundreds of flights, and that he had had security problems at Logan Airport before and dealt with them in the same way as he dealt with the situation at issue here.

Around 6:00am on December 28, 2003, approximately 35 minutes prior to the scheduled departure, the Captain of Flight 2237 was walking to the departure gate. A man with a ponytail approached the Captain and asked him if he was the Captain for the Fort Lauderdale flight. The Captain initially thought that the passenger was reporting a problem and so

he responded that he was the Captain for the flight. The passenger said, "Good. I'm going with you. We're going to have a good day today." The passenger then immediately left the area; the Captain continued to the gate. The Captain was greatly concerned about this exchange: he testified at trial that "it [was] probably one of the most odd exchanges that I've ever had with anyone in my entire career, and it concerned me greatly."

After the passengers boarded, the Captain, in the cockpit, spoke by telephone with Flight Attendant Two in the rear of the plane.[1] He asked her to check on the location of the man with the ponytail and whether she "had any other concerns that she could see with this particular passenger." The Captain agreed at trial that he must have described the man to her but did not recall the exact description. [The flight attendants described the man with the ponytail as having a heavy accent.]

Flight Attendant Two checked and returned to the Captain with information that the man with the ponytail was sitting with two other men in Row 20, an emergency exit row. The plaintiff, seated by the window, was one of those men.

The location of the man with the ponytail in an exit row concerned the Captain. The emergency exit row location is important to safety because the exit

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[1]We refer to the three flight attendants assigned to Flight 2237 using AA's official designations for their positions: Flight Attendant One, Flight Attendant Two, and Flight Attendant Four. There was no Flight Attendant Three.

rows are critical if the aircraft needs to be evacuated. Passengers sitting in the exit rows need to meet specific regulatory criteria, 14 C.F.R. § 121.585(b), which among other things require them to follow the instructions of crew-members and assist other passengers in evacuating the aircraft.

Flight Attendant Two told the Captain that she perceived the man in the ponytail was traveling with the two other men in the row, one of whom was the plaintiff.[2] Regardless, the Captain said it was not important from his perspective whether or not the three men were traveling together: "[I]f people are trying to harm the aircraft or anyone on board, they might be traveling together, they might not be traveling together."

Flight Attendant Two also expressed her concerns to the Captain about the plaintiff. She described an incident she had with the plaintiff in the terminal. She told the Captain that this passenger, the plaintiff, had been hostile to her.[3]

Specifically, she reported to the Captain that prior to boarding she had been approached by the

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[2]The plaintiff is an American citizen. The other two men were Israeli, a fact learned by the State Police later. The plaintiff testified that the two other men "looked Middle Eastern" and that they looked like the plaintiff "in the sense that they had dark hair and . . . an olive complexion."

[3]Plaintiff's theory of discrimination was that Flight Attendant Two was motivated by discriminatory bias based on national origin, because of the plaintiff's appearance as having "dark hair" and an "olive complexion."

plaintiff in the gate area. He was "very hostile and extremely insistent that his seat be switched to an exit row seat." She explained to the plaintiff that she was a flight attendant and not a gate agent and asked him to take a seat until someone could help him. She said that the plaintiff "continued to stare at her and sat down right close to the gate. . . . [T]he entire time that she worked at the gate he was just sitting there staring at her, making her extremely uncomfortable."[4]

She also told the Captain that this passenger boarded the plane into his coach class seat when only the first class passengers were called to board, and that the plaintiff immediately went to the bathroom for an extended period of time. The Captain was concerned about the plaintiff's early use of the lavatory because it is a very insecure area in which a bomb may have been placed. He requested the co-pilot on the flight check the lavatory. The co-pilot did so and found nothing.

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[4]As Flight Attendant Two walked down the jetbridge to the aircraft with the other flight attendants, she told them that her encounter with the plaintiff had made her uncomfortable. This is also what she told the Captain. Plaintiff denies her version of the events, but this is what she communicated to the Captain at the time.

Flight Attendant Four went to the Captain[5] with her independent concerns about the three men in Row 20. She reported to the Captain that during (and after) the safety briefing for those seated in exit rows, two of the three passengers in Row 20 were acting very bizarrely and asking questions such as "Is this how you want me to do it?"

She reported that after the briefing, one of the three passengers in Row 20 had pressed the flight attendant call light. Although Flight Attendant Four was upset by their earlier behavior, she went to answer the call light. The two men started in again, laughing, and one asked her, "Where do you want me to put the door?" She testified that no one "acts like this during an exit row briefing. This is a serious safety briefing." She observed the plaintiff, who was leaning forward and watching the other two passengers: "[H]e wasn't laughing outright but he had this smile on his face like he found it very amusing." She added, "I don't think the other passengers [on the plane] found it amusing when we're talking about a safety issue." She went up front to the cockpit to report this to the Captain because the behavior "was so unusual and . . . somewhat frightening."

Flight Attendant Four was anxious and disturbed about what was happening. Her concerns went to all three men in the row. She thought they

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[5]In his deposition, the Captain had testified that he could not recall the other two flight attendants expressing concerns to him. At trial, he testified that they also expressed concerns to him; their testimony verified that fact.

were together because the plaintiff had specifically requested the seat he occupied and because, she thought, he would more likely find their conduct to be amusing (as he appeared to do) and not take their conduct seriously if the three were friends.

Flight Attendant One also had observed that when the man with the ponytail boarded the plane, he had looked into the cockpit and asked the Captain, "Are you our Captain?" Both the Captain and Flight Attendant One thought this strange. The Captain thought it strange because he had already spoken with this man in the terminal and confirmed he was the Captain. Flight Attendant One thought it strange because it was obvious that he was the Captain given his location right next to the cockpit door.

In addition, Flight Attendant Two told the Captain of separate concerns that the plaintiff had an "obvious interest in flight attendant duties; someone might call it staring." This worried the Captain, as undue interest from a passenger in the flight attendants' conduct can trigger a safety concern.

As a result of all of these events, the Captain convened a meeting of the flight crew on board the aircraft to discuss everyone's concerns and determine which course of action -- either leaving as scheduled or delaying the flight to investigate further -- was the most appropriate. The plane had been boarded by then and the jetbridge had been removed.

At this point, Flight Attendant Two reported to the Captain that other passengers had expressed their discomfort with the man with the ponytail and with comments he and others in Row 20 had made, which included wishing other passengers "Happy New Year" and acting in a "very boisterous" manner. Flight Attendant Two also reported that the passengers in Row 20 now seemed to be feigning sleep; she thought the sleep was feigned given that these passengers had shortly before been boisterous and making lively comments.

The Captain did not question the information he received from Flight Attendant Two, who was a thirty-seven-year veteran with a stellar reputation. In the meeting the Captain had convened, the flight attendants said they were not comfortable with the flight going ahead.

The Captain then decided that based on his own observations and the crew's observations, including the separate information from the three flight attendants, there was adequate reason to investigate the security concerns in more detail, even if this meant delaying the takeoff of a fully boarded plane. Thus, the Captain made the first decision not to depart the gate, but to investigate further.

The Captain called the gate agent and had the jetbridge brought back to the plane. The Captain then called the ground security coordinator and notified him of the concerns he and all of the flight attendants had with the three passengers. The gate agent and the ground security coordinator both

came aboard the aircraft, and the Captain further discussed the security concerns with them.

The second decision made was to remove the three men from the plane for further questioning by appropriate authorities. At the Captain's request, the three men were removed from the aircraft for further questioning because "of the number of concerns, not just [Flight Attendant Two's] concerns." When the three passengers were removed from the plane, they were asked to take their carry-on bags with them. The Captain did not interview the three passengers himself, as he was busy with the flight and that was not his responsibility.

The Captain then called company systems operations control in Dallas both to give them a full report on the security issues and to notify them that the flight would not be departing on time. In addition, the Captain had a ten-minute conversation with his superior, an off-site "chief pilot on duty," who offered to come from home to the airport and help. The Captain said he would handle it on his own.

The Captain testified his decision not to takeoff and to remove the three men in Row 20 from the plane for questioning was based on his odd experience with the man with the ponytail, the information and concerns about all three passengers in the exit row expressed by all three flight attendants, as well as the fact that the flight attendants were uncomfortable with the flight departing. The Captain was particularly concerned with the report of Flight Attendant Two that both the plaintiff and the man

with the ponytail "seemed extremely interested in the duties" of two of the flight attendants.

After the three men were removed for questioning by the State Police in a separate location in the terminal, a passenger on the plane reported that one of the three men in Row 20 had box cutters confiscated from him at the Transportation and Security Administration ("TSA") security checkpoint. Once he heard the report, the Captain questioned the passenger himself. The Captain then reported it personally to the head of TSA at Logan and told him that "if box cutters had been taken from one of my passengers on board my aircraft, that . . . aircraft was not going to fly the entire day no matter what was checked." The head of TSA did research and reported back to the Captain that box cutters had been taken from a passenger on a different flight that morning. Nonetheless, the Captain testified, "That event, in and of itself, concerned me greatly."

At some point, Flight Attendant Four reported to the Captain that "we had more than one passenger, who were not traveling together, who had concerns about passengers in the exit row; passengers who were becoming very nervous." The Captain testified, "And I remember one woman, with two small children, I believe, and she was getting very nervous to the point where I thought she might not go with us."

The Captain then made a third decision, to empty the aircraft of all passengers, all carry-on belongings, and all cargo, and have the aircraft

searched with dogs. He did so because of the box cutter concern, and because the Captain recognized that tension levels were rising among the other 126 passengers, and after consulting with three Massachusetts State Police officers and the TSA.

The Captain testified that it was an extremely difficult decision to empty the aircraft of passengers and baggage. He knew it meant inconvenience to over 100 people, that it would cost AA a great deal of money, and that he and his flight crew would be late getting back to their families. Indeed, he met some resistance from AA employees to unloading the bags, because it is "quite a project." The Captain told them, "[T]hat's just what we're going to have to do. We have to make sure this aircraft is safe to depart." This process took three hours.

The three men from Row 20 had been moved to a secured location away from the gate and apart from the other passengers and were questioned by one of the State Police troopers. The Captain was told that the State Police, in questioning the three men, had become concerned about the passport of one of the men.

While the search of the plane was conducted, the passengers were kept in a secured area. During this period, the flight attendants became even more concerned. The flight attendants informed the Captain that they elected not to continue the trip.[6]

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[6]Thus, the flight attendants decided they would not continue on the trip before they knew whether the plaintiff

(continued...)

Also during this period, the State Police troopers conducted lengthy interviews with passengers who had observed what the Captain called the "suspicious behavior" of the three men. The Captain had lengthy and ongoing discussions with local AA management, the State Police, TSA management, and air marshals.

From the Captain's perspective, it was the State Police who decided that the three men would not travel that day on the flight. During his conversations with the sky marshals service, systems operations control, and the chief pilot on duty, "a state police officer approached me and told me, point blank, 'These three gentlemen are not traveling with you today. It's out of your hands.'" The Captain accepted this decision.

After this, the Captain made the decision that the flight would continue on to Fort Lauderdale after all the passengers other than the three men had been re-screened by security, and the re-screened bags reloaded. The original flight attendants refused to continue the trip. They were replaced by another three attendants from a reserve crew. The flight departed approximately three hours late at 9:33am. The captain informed the pertinent AA personnel of this. The flight went without the plaintiff or the other two men.

Within twenty-four hours of the situation, the Captain, as is standard AA practice, prepared a

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[6](...continued)
would be a passenger should the flight continue.

report, which he filed with the company. Pertinently, the Captain's concerns about the three men had not abated. In fact, in his report, the Captain noted:

> I would like to get the status of the passengers who we did not transport. Whether they took a later flight, no flight, etc. I would like to know whether the authorities found anything that pertains to our security concerns. And, will passengers be allowed to fly AA again if no 'problems' were found?

That report, in evidence, was consistent with his testimony.

At no time, the Captain testified, did he ever see the plaintiff, nor was he aware of the plaintiff's appearance. The plaintiff was seated in 20F, a window seat which is not visible to the Captain from the front of the plane.[7] The Captain flatly denied that the plaintiff's ethnic appearance had anything to do with his decision to remove plaintiff from the flight:

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[7]During the Captain's testimony, counsel for the plaintiff suggested to the Captain that when the gate agent came on the plane, the Captain emerged from the cockpit to point at the man with the ponytail in Row 20. The Captain said he could not recall having done that, but that he might have been able to point out only the passenger with the ponytail whom he recognized without leaving the front of the plane.

> I'm emphatic about it, one, because I had never seen Mr. Cerqueira up to that point; two, I had a number of concerns from three separate employees, and more than one passenger not traveling together. I didn't have one passenger with concerns, I had more than one passenger with concerns. So I have all of the people working for me concerned for numerous reasons, and I have some of my passengers concerned. I would have been derelict in my duty to ignore those concerns and depart with that flight.
>
> I fly hundred of flights. I fly the equivalent of a flight every day. I fly thousands of passengers -- all races, all religions -- every day. I've had other security problems at Logan Airport and they're dealt with the same way. I would do everything the same way.

The first time the Captain ever saw the plaintiff was at trial.

B. Denial of Rebooking

During the questioning of the three men by the State Police, the Captain had communicated the situation to the systems operations control ("SOC") manager in Dallas. The SOC manager was the only person with the authority to make a decision on

whether a passenger who had been removed from a plane for questioning could be rebooked. At some point during the period, the SOC manager decided to deny rebooking to the plaintiff. He made this decision based on the information communicated to him by the Captain which included the Captain's information from those involved with the investigation in Boston.

The SOC manager communicated his decision to the AA customer service manager at Logan, advising her that the plaintiff was denied boarding and instructing her to refund his ticket. The customer service manager then made an entry into the plaintiff's passenger record at 9:01am, which stated that the passenger was "denied travel on [flight] 2237 per SOC [manager] due to security issue." A few minutes later, at 9:08am, an employee at the SOC amended the record to note that the passenger was "denied boarding . . . due [to] security issues. Refund ticket . . . Do not rebook on AA." It is the decision not to rebook that morning which is at issue.

The three passengers were released at some point roughly around 9:00am. The passengers were escorted to the AA ticket counter, and one of the state troopers communicated to an AA agent that the passengers were "free to go." Another trooper noted in the police administrative log at 9:00am that the three passengers "were denied boarding [and] will be re-booked."

After being escorted to the ticket counter, the plaintiff asked a reservations agent to rebook him. The reservations agent told him that there was an

afternoon flight available, but that she was not authorized to make a decision to rebook. Approximately twenty to thirty minutes later, the customer service manager who had spoken to the SOC manager came to the ticket counter. The customer service manager asked for the plaintiff's credit card and refunded the Boston to Fort Lauderdale portion of his trip. When the plaintiff asked the customer service manager why he was not being rebooked, she told him that the decision had been made by AA's corporate offices.[8] For any further information, she informed the plaintiff, he would need to contact the corporate offices directly. Apparently, the other two passengers were also denied rebooking.

The plaintiff then called other airlines to try and make alternate arrangements to fly to his home in Florida that day. All of the flights he found were expensive, so he did not book one. His parents came to pick him up at the airport and he returned to his parents' house in Fall River, Massachusetts.

Later that day, the plaintiff wrote an e-mail to American Airlines customer service asking for any information they had about the incident, including what he was accused of saying on the plane, and the implications of the incident for his future travel with AA or any other airline.

The following day, the plaintiff completed his journey on another airline without incident.

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[8]The plaintiff testified that the customer service manager told him that the decision was made because of something the plaintiff had said on the plane.

Nine days after the incident, on January 6, 2004, the plaintiff received a response from a customer relations official at AA. The response stated that the airline had "fully reviewed the decision" to deny boarding and explained that it was because "our personnel perceived certain aspects of your behavior which could have made other customers uncomfortable on board the aircraft." It informed the plaintiff that "[t]here is no indication that you will be denied boarding in the future."

II.

The plaintiff filed a complaint of discrimination with the Massachusetts Commission Against Discrimination ("MCAD") in the fall of 2004. After the MCAD concluded that the plaintiff had established a prima facie case, the plaintiff brought suit in August 2005 in the federal district court of Massachusetts against American Airlines, the Captain, Flight Attendant Two, the reservations agent, and the customer service manager, alleging discrimination under both federal and state statutes, and seeking compensatory and punitive damages and declaratory and injunctive relief.[9]

The case was tried to a jury in January 2007. We describe later the jury instructions requested and the instructions actually given. At the close of the

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[9]He amended his complaint a month later to remove all of the individual defendants, leaving only American Airlines.

plaintiff's case in chief, AA moved for judgment as a matter of law. The district court denied the motion. AA renewed its motion at the close of all the evidence, and the district court denied the motion again. After deliberating, the jury found for the plaintiff and awarded him compensatory damages of $130,000 and punitive damages of $270,000.

The defendants then filed two post-judgment motions. The first was a motion for judgment notwithstanding the verdict on the grounds that the plaintiff had not proved that AA had intentionally discriminated against him, and that he had not proved that AA's decision was arbitrary or capricious under 49 U.S.C. § 44902(b). The second sought a new trial on the same basis and also claimed that the court erred in not giving an explicit jury instruction on § 44902(b), that it had erred in instructing the jury that AA was liable if any of the information that went into the airline's decisions was tainted with discriminatory animus, that AA should have been allowed to offer testimony related to its security procedures, and that the court's admission of a consent order between the Department of Transportation and AA represented unfair prejudice. In the alternative, the second motion sought remittitur of the damages awarded to the plaintiff.

After oral argument, the district court denied AA's first motion for JNOV from the bench. In a written opinion, *Cerqueira* v. *American Airlines, Inc.*, 484 F. Supp. 2d 232 (D. Mass. 2007), the district court rejected the defendant's second motion. The court found that its jury instructions did not constitute

prejudicial error and that its evidentiary rulings were proper. The court also rejected AA's request for a remittitur. In a second opinion, the court awarded the plaintiff attorneys' fees. *Cerqueira* v. *Am. Airlines, Inc.*, 484 F. Supp. 2d 241 (D. Mass. 2007).

On appeal,[10] AA argues there was error in the failure to give the requested § 44902(b) instructions, errors in the instructions given, and error in the admission of the consent order. The defendant also argues that the verdict is not supported by the evidence and that the punitive damages award is unreasonable. Accordingly, the defendant asks for judgment to be entered for AA, or alternatively that a new trial be granted.

III.

This case does not involve any claim of constitutional right on the part of the plaintiff, in which the power of Congress is constrained by the Constitution. Rather, the case involves only the intersection of various statutes, which articulate competing policy concerns.

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[10]We appreciate the assistance provided by amici curiae Air Transport Association of America, Inc., Lawyers' Committee for Civil Rights Under Law, Asian American Justice Center, Mexican American Legal Defense & Educational Fund, National Association for the Advancement of Colored People, and Puerto Rican Legal Defense Fund.

As a matter of federal policy, under the Federal Aviation Act, "assigning and maintaining safety [ranks] as the highest priority in air commerce." 49 U.S.C. § 40101(a)(1). Thus, the highest priority is assigned to safety, even though the federal aviation statute also has a general prohibition on race and national origin discrimination. "An air carrier . . . may not subject a person in air transportation to discrimination on the basis of race, color, national origin, religion, sex or ancestry." 49 U.S.C. § 40127(a).[11] Plaintiff's suit is brought under 42 U.S.C. § 1981, which was expanded in the Civil Rights Act of 1991 to cover the making, performance, modification, and termination of contracts. Id. § 1981(b).

In 49 U.S.C. § 44902(a), which became effective in 1961,[12] Congress mandated air carriers to refuse to

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[11]The provision was enacted in 2000. It appears to have been a replacement for an earlier statute which was repealed. This older section was part of a larger, comprehensive scheme of airline regulation, and as such was repealed in 1983 as part of the Airline Deregulation Act of 1978, Pub. L. 95-504, 92 Stat. 1705. The repealed statute, 49 U.S.C. § 1374, barred airlines from giving any person "undue or unreasonable preference or advantage"or subjecting any person to "unjust discrimination or any undue or unreasonable prejudice or disadvantage." Plaintiff does not purport to bring suit under § 40127(a) and we do not reach the question of whether it creates an implied right of action.

[12]In 1994, Congress moved the statute from 49 U.S.C. § 1511(a) to 49 U.S.C. § 44902(b). Pub. L. 103-272, § 1(e), 108

(continued...)

transport passengers and property where a passenger does not consent to a search of his person or property for dangerous weapons, explosives, or destructive substances. In addition to mandating that some passengers be refused transport, Congress also authorized, at subsection (b), air carriers to engage in "permissive refusal":

> Subject to regulations of the Under Secretary, an air carrier, intrastate air carrier, or foreign air carrier may refuse to transport a passenger or property the carrier decides is, or might be, inimical to safety.

49 U.S.C. § 44902(b). Thus Congress supplemented the discretion airlines already had under common law to exclude certain passengers, in light of their duty of utmost care to all passengers. *See Williams v. Trans World Airlines*, 509 F.2d 942, 946 n.8 (2d Cir. 1975). It is obvious that § 44902(b) was enacted in furtherance of the first priority of safety in air traffic, 49 U.S.C. § 40101(a)(1). The legislative history confirms this. *See generally Crimes Aboard Aircraft in Air Commerce: Hearing Before the Aviation Subcomm. of the S. Comm. on Commerce*, 87th Cong. (1961).

The permissive refusal authorization in § 44902(b) has several distinct components. The

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[12](...continued)
Stat. 1204 (1994).

statute says the air carrier "may" refuse to transport, thus vesting discretion over the decision in the air carrier. 49 U.S.C. § 44902(b). That discretion is very broad. The carrier need not decide that the passenger or property is inimical to safety; the authorization extends to situations in which the carrier decides the passenger or property "might be" inimical to safety. *Id.* The congressional authorization is granted to the air carrier to make the decision. The only limit contained in the statute on that discretion is that it be subject to regulations of the Under Secretary of Transportation for Security.

In turn, the Under Secretary has not promulgated regulations limiting the airline's discretion directly under 49 U.S.C. § 44902(b). However, one other regulation is directly pertinent, as it states that:

> The pilot in command of an aircraft is directly responsible for, and is the final authority as to the operation of that aircraft.

14 C.F.R. § 91.3(a). In other words, the pilot in command stands in the role of the air carrier for a decision to remove a passenger from a flight.[13] The

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[13]While it is true, as amicus for plaintiff points out, that the statute refers to the air carrier's decision, the appropriate focus is on the actual decisionmaker: the pilot in command of the aircraft where the passenger is removed from the pilot's flight. That is so as a matter of law under 14 C.F.R. § 91.3. In

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authorization in § 44902(b) also applies to decisions by others than the pilot not to rebook a passenger based on safety concerns. In this case, that decision was made by another person, based on information from the pilot.

Section 44902 itself does not provide for judicial review of decisions to refuse transportation by the pilot in command. Nonetheless, courts have entertained actions involving § 44902(b) brought under other general statutes which prohibit discrimination, such as § 1981 and Title VI of the Civil Rights Act.[14] *See, e.g., Williams*, 509 F.2d 942; *Dasrath* v. *Cont'l Airlines, Inc.*, 467 F. Supp. 2d 431 (D.N.J. 2006); *Al-Qudhai'een* v. *Am. W. Airlines, Inc.*, 267 F. Supp. 2d 841 (S.D. Ohio 2003).

Accordingly, the parties have assumed that the protections of 49 U.S.C. § 44902 and the U.S. Department of Transportation administrative enforcement mechanisms to protect the rights of passengers, 49 U.S.C. §§ 46101, 46301, do not preclude the filing of actions under 42 U.S.C. § 1981, and we will assume

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[13](...continued)
practice in this context, it is not the air carrier that makes the decision to refuse transport to the passenger on the flight, but the pilot in command, who acts for the air carrier.

[14]AA argues that no Title VI claim is stated here because the only federal financial assistance AA receives is government compensation under the Stabilization Act, which does not qualify as federal financial assistance under 42 U.S.C. § 2000d. We need not reach the issue. Any Title VI claim would fail for the same reasons we express.

the same.[15] It is clear that § 44902(b), being the more specific statute, applies to this case. *See Vimar Seguros y Reaseguros, S.A.* v. *M/V Sky Reefer*, 29 F.3d 727, 732 (1st Cir. 1994). Congress has, by statute, explicitly given safety the highest priority. *See* 49 U.S.C. § 40101(a)(1) (recognizing "safety as the highest priority in air commerce").

Some courts have described an air carrier's reliance on § 44902(b) as a defense in the nature of an immunity. *See, e.g., Al-Qudhai'een*, 267 F. Supp. 2d at 848 (finding defendants "immun[e] under 49 U.S.C. § 44902(b)"). In our view, § 44902(b) does not merely create a defense[16]: the statute is an affirma

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[15]The plaintiff's claim based on the state public accommodation discrimination law, Mass. Gen. Laws ch. 272, § 98, may fail under the preemption clause of the Airline Deregulation Act of 1978, 49 U.S.C. § 41713(b). See, e.g., Am. Airlines, Inc. v. Wolens, 513 U.S. 219, 228 (1995) (holding that the Airline Deregulation Act preempted state-law consumer fraud claim); Morales v. Trans World Airlines, Inc., 504 U.S. 374, 391 (1992) (holding that the Airline Deregulation Act preempted state-law false advertising claim). In several cases, federal circuit courts have held that the federal interest expressed in 49 U.S.C. § 44902(b) and its predecessor governs airlines' boarding procedures and preempts state law contract claims. See, e.g., Smith v. Comair, Inc., 134 F.3d 254, 258-59 (4th Cir. 1998); O'Carroll v. Am. Airlines, Inc., 863 F.2d 11, 13 (5th Cir. 1989). The resolution of this case on other grounds means we do not reach the preemption questions.

[16]Although §44902 does not merely provide immunity, the law of qualified immunity provides some useful parallels, though qualified immunity is a judicially created defense. For (continued...)

tive grant of permission to the air carrier. Congress specifically authorized permissive refusals by air carriers; Congress did not say § 44902 was merely creating a defense. It is the plaintiff who carries the burden to show that § 44902(b) is inapplicable.

The courts, by judicial construction of § 44902(b), have adopted a standard for liability for an airline's permissive refusal to transport decisions. This standard reconciles the primary priority of safety with other important policies, such as § 1981's prohibitions on racial discrimination. The standard most frequently articulated is that developed by the Second Circuit in *Williams*: that the air carrier's decision to refuse air transport must be shown to be arbitrary or capricious. *See Williams*, 509 F.2d at 948. The arbitrary or capricious standard was later adopted by the Ninth Circuit in *Cordero* v. *Cia Mexicana de Aviacion, S.A.*, 681 F.2d 669, 671-72 (9th Cir. 1982). We agree with *Williams* and hold that an air carrier's decisions to refuse transport under § 44902(b) are not subject to liability unless the decision is arbitrary or capricious. There is no need

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[16](...continued)
example, in Saucier v. Katz, 533 U.S. 194, 205 (2001), a decision about the appropriate level of force is evaluated from the "on-scene perspective," id., and not with the benefit of "20/20 vision of hindsight," id. (quoting Graham v. Connor, 490 U.S. 386, 396 (1989)) (internal quotation marks omitted). Under the qualified immunity tests, even mistaken decisions can be protected by immunity.

here to repeat the cogent reasoning in *Williams*. *See* 509 F.2d at 947-49.

We also agree with *Williams* that Congress did not intend the non-discrimination provisions of the FAA or of § 1981 to limit or to render inoperative the refusal rights of the air carrier. *Id.* at 948. Congress left decisions to refuse passage to the air carrier, and any review in the courts is limited to review for arbitrariness or capriciousness. Congress was also well aware that the air carriers' decisions to deny transport have to be made very quickly and based on limited information. *See id.* (noting that the permissive refusal statute specifically provides for the subjective judgment of the air carrier). Section 44902(b) must be interpreted in that light. Congress "did not contemplate that the flight would have to be held up or cancelled until certainty was achieved." Id. Thus, in evaluating whether a decision to refuse transport is arbitrary or capricious,[17] the following principles apply:

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[17]The term "reasonableness" is widely used in the law and we do not use it here. Of course, a reasonable decision is not arbitrary or capricious. *See Williams*, 509 F.2d at 948. And a decision which is arbitrary is totally devoid of reason. *See Cordero*, 681 F.2d at 672. The arbitrariness or capriciousness standard here is not the same as reasonableness under a negligence standard. *See Adamsons* v. *Am. Airlines, Inc.*, 444 N.E.2d 21, 24-25 (N.Y. 1982), *cert. denied*, 463 U.S. 1209 (1983).

Similarly, in the context of Fourth Amendment rights, air carriers are not even held to normal standards for "reasonableness" for inspection of property. *See United States*

(continued...)

(1) In cases involving removal from flights under § 44902, it is the decision by the pilot in charge who refuses passage which stands as the decision of the air carrier. The congressional intent in providing permission for air carriers to refuse transport because of safety concerns would be undercut if the focus were on the air carrier writ large, and not on the individuals given the authority for the decision.

(2) Review of a decision to refuse transport by the Captain is restricted to what information was actually known by the decisionmaker at the time of the decision. The test is not what the Captain reasonably *should* have known. Courts have routinely refused to permit consideration of information not actually known to the Captain. *See, e.g., Dasrath*, 467 F. Supp. 2d at 446 ("[I]f [the Captain] reasonably believed that something had taken place (even if it had not), his reasonable belief is what is critical, not what actually took place."); *Al-Qudhai'een*, 267 F. Supp. 2d at 847 n.4.

(3) Because the decision must be made in an expedient manner, and it is the Captain who bears the ultimate responsibility of ensuring the safety of the aircraft, there is no obligation on the part of the

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[17](...continued)
v. *Momoh*, 427 F.3d 137, 141 (1st Cir. 2005) (recognizing that Fourth Amendment reasonableness analysis is inapplicable to an air carrier's inspection of property) (citing *United States* v. *Edwards*, 602 F.2d 458 (1st Cir. 1979)); *see also, e.g.*, 49 U.S.C. § 44902(a) (requiring air carriers to refuse to transport passengers who do not submit to a search).

Captain (or the SOC manager, whose prompt decision not to rebook was based on the Captain's decision) to make a thorough inquiry into the information received, the sources of that information, or to engage in an investigation. *See, e.g., Cordero*, 681 F.2d at 672. The Captain (or other decisionmaker) is entitled to accept at face value the representations made to him by other air carrier employees. *See, e.g., id.; Williams*, 509 F.2d at 948. Thus, even mistaken decisions are protected as long as they are not arbitrary or capricious. We will assume that there is an exception to this where no responsible decisionmaker could credit the information provided. *See Williams*, 509 F.2d at 948; *see also* Cordero, 681 F.2d at 672 (recognizing that the decision must be made on a rational appraisal of the facts).

Such an exception has no application in this case, as our recitation of the facts makes clear.

(4) The biases of a non-decisionmaker may not be attributed to the decisionmakers. *See Al-Qudhai'een*, 267 F. Supp. 2d at 848 (noting that the pilot "is entitled to rely on the information provided to him by his crew despite any exaggerations or false representations").

In light of these principles, the jury verdict cannot stand either on the law or on the evidence. The district court erred both when it refused to give several instructions requested by American and in the instructions it did give.

A. Error in Refusal To Instruct on § 44902(b)

We review jury instructions de novo, recognizing that properly preserved objections to the omission of desired jury instructions constitute reversible error only if the omitted instructions were (1) correct as a matter of substantive law, (2) not substantially covered in the charge as a whole, and (3) integral to an important point in the case. *Roger Edwards, LLC* v. *Fiddes & Sons, Ltd.*, 387 F.3d 90, 95 (1st Cir. 2004); *Sanchez-Lopez* v. *Fuentes-Pujols*, 375 F.3d 121, 133 (1st Cir. 2004).

American Airlines requested the following jury instructions on § 44902(b), which are consistent with *Williams* and *Cordero*:

(1) "The Federal Aviation Act permits an airline, through its Captain, to exercise his discretion to deny any passenger air transport whom the Captain believes is or may be inimical to the safety of the passengers or aircraft. If you find that American's decision to remove the plaintiff . . . was based upon its concern for the safety and security of the passengers you must return a verdict in favor of American."

(2) "The law endows the airline with discretion in accepting or rejecting a passenger, based on considerations of safety and problems inherent to air travel, and that such discretion, if exercised in good faith and for a rational reason, must be accepted."

(3) "You must return a verdict for American unless you find its actions were 'arbitrary or capricious' . . . ."

(4) "[Y]ou must review all of the facts known to [the Captain, the SOC manager,] and the Massachusetts State Police at the time they formed their decision. You must not rely on any facts disclosed in hindsight."

(5) "A Captain . . . is entitled to base a decision to remove a passenger from a flight on the representations made to him by other airline employees about the passenger's behavior. . . . [T]he Captain is not obligated to leave the cockpit and investigate the truthfulness of the flight attendant's statements."

Each of these instructions accurately states the law.[18] The district court, nonetheless, declined to give any of these instructions. The court never informed the jury that it must find the Captain's decision to be arbitrary or capricious in order to hold AA liable. The court also erred when it declined to instruct the jury that the legality of the air carrier's decision was to be judged based only on the information known to the decisionmaker at the time of the decision and not based on information gained later in hindsight. Further, at no point did the court instruct the jury that the Captain was entitled to rely

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[18]While some courts have stated that the arbitrary or capricious standard is an objective one, *see Dasrath*, 467 F. Supp. 2d at 445, we stress that the point of view taken is that of the pilot in command who is the decisionmaker, and not that of the average juror. We have no need to decide whether a seemingly arbitrary or capricious decision by a Captain to deny passage is nonetheless protected by the Captain's subjective good faith, as American argues.

on the representations of other employees, and that he had no duty or obligation to investigate the truthfulness of representations made to him. The defendant properly objected to the court's failure to so instruct. Cerqueira did not object to these requested instructions; nonetheless, the court erroneously chose not to give them.

The plaintiff argues that these omissions do not require reversal because the court did give other instructions which, he claims, covered these points. But those instructions do not remedy the error. Further, these instructions were themselves based on error.

The court did instruct that the jury was "entitled to consider that American Airlines is expected to operate its airlines with the primary goal of the safety and well-being of the traveling public." It instructed that "we expect of American Airlines . . . to behave themselves in a way that puts the safety of the traveling public and their employees first. *But they cannot, they're forbidden by the law from acting to discriminate. . . .*" (Emphasis added.) Through the juxtaposition of these two sentences, the district court subordinated the safety principle, which was given the highest priority by Congress.

Those instructions are, in any event, a far cry from an instruction that the air carrier was mandated by law to put safety first and that the law specifically authorized air carriers to refuse to transport passengers who, in the airline's view, "might be inimical to safety." The instructional error is not a matter of mere wording. The omitted in-

structions were required as a matter of substantive law, were not substantially covered in the charge as a whole, and were essential to the case. *Roger Edwards, LLC*, 387 F.3d at 95.

B. Instructions Actually Given Were in Error

The jury verdict was based on erroneous instructions which were in error both in the omissions to give the correct instructions and in the instructions which were given. The court instructed the jury as follows:

(1) that liability for all employees' actions accrued to the air carrier, not just the decisionmakers' actions:

> Now, American Airlines is a company.... Companies are people and they're bureaucracies and they operate hierarchically; in other words, there are higher-ups in the company and lower down people. But all are employees of the company and . . . if you think they're acting within the scope of their employment and they're doing what they are doing as employees of American Airlines, then that conduct is attributed to American Airlines.

(2) that it could find for the plaintiff if it concluded that a lower-ranking American employee,

such as a flight attendant, gave certain information to the decisionmaker:

> But [American] cannot, they're forbidden by law from acting to discriminate . . . against someone based upon their perception that that person is a certain race or a certain ethnic heritage. If that's why they did what they did, that's forbidden by the law. And let's say that's why a lower-level person acted as she did in respect to this.
>
> If that action is transformed into the action of the higher corporate people, if that's what drives the action of the higher corporate people, American's stuck with it because American should take care that they're not acting against a person based on the perceived race or ethnicity. The law forbids that.

(3) that American Airlines had the ultimate burden of showing that its reasons for removing the plaintiff were legitimate:

> [I]f you think there is a forbidden reason in there, then the burden shifts over to American Airlines. And if [American Airlines] would have done it anyway, if they would have behaved exactly the same way anyway for legitimate reasons, if . . . American Airlines proves that, well,

your verdict must be for American Airlines.

The court, in its written opinion denying American's motion for a new trial, set forth its reasoning for these jury instructions. *See Cerqueira*, 484 F. Supp. 2d at 234. The court reasoned that its instruction on finding intentional discrimination was adequate to cover § 44902(b), because if there was intentional discrimination as defined under the burden-shifting analysis of the *McDonnell Douglas* test, that would itself per se be arbitrary or capricious. *Id.*; *see McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). That reasoning was a mismatch with this case.

Here, there is absolutely no evidence that either the Captain himself or the SOC manager had discriminatory animus, let alone that their decisions to refuse to transport a passenger, which were made under time pressure, were based on any discriminatory animus. The decision not to reboard the plaintiff on the flight was made by the State Police and accepted by the Captain. The Captain did not see the plaintiff and thus was unaware of his appearance, whether Middle Eastern or not, until the time of the trial. The Captain's actions were justified in light of the safety concerns described earlier.

The SOC manager, who was in Dallas, based his decision, made that same morning and within minutes, not to rebook the plaintiff on information provided by the Captain, specifically all of the security concerns that formed the basis of the Captain's

decision relayed to him from Boston. The § 1981 claim against the SOC manager's decision was derivative of the § 1981 claim against the Captain's decision. There is no evidence that the SOC manager's decision was based on race discrimination. There is also no evidence that any of the security concerns which made the Captain's decision appropriate had been proven unfounded by the time the SOC manager decided within minutes that morning to deny rebooking or that the SOC manager's following the Captain's decision was motivated by race.[19] Further, there is no evidence that the SOC manager was aware of the plaintiff's appearance, race, or ethnicity. As a result, the § 1981 claim against the SOC manager fails, and § 1981 imposed no further duties on him.

If the Captain had made a decision to remove plaintiff from this flight based only on the Captain's bias toward persons who appeared to be of Middle Eastern descent, such a decision would be arbitrary within the meaning of § 44902(b). In such instances, there is congruence between the different statutory commands -- passenger safety and non-discrimination. The jury, though, was never asked the correct questions here.

The instructions given were based on three incorrect assumptions on the part of the district

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[19]This case does not concern a situation where a SOC manager's decision to deny rebooking was not made based on the Captain's safety concerns and not made in short proximity to the Captain's decision not to allow plaintiff to fly.

court: (1) that instructions from Title VII employment discrimination cases were appropriate in a refusal to transport case under § 44902(b); (2) that the instructions given were required by the doctrine of respondeat superior; and (3) that the instructions were required by *Cariglia* v. *Hertz Equipment Rental Corp.*, 363 F.3d 77 (1st Cir. 2004).

This claim, however, is not an employment discrimination claim arising under Title VII; it arose under § 1981[20] and challenged a decision made pursuant to the authorization given an air carrier by Congress in § 44902(b). As we have held, the burden is on the plaintiff to show the decision not to transport was arbitrary or capricious. *Cordero* (and *Williams*) hold the same. *See Cordero*, 681 F.2d at 672; *Williams*, 509 F.2d at 948. The jury must be instructed that the Captain has the power to refuse transport because transport of a passenger "might be" inimical to safety unless that decision was arbitrary or capricious. *See Cordero*, 681 F.2d at 672. It is the plaintiff's burden to show the Captain's decision was arbitrary or capricious. The test we

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[20]Nothing in the 1991 Amendments to § 1981 suggested Congress was changing this substantive law. Indeed, we have held that:

> The legislative history of the 1991 amendment makes it crystal clear that Congress did not intend to convert Section 1981 into a general prohibition against race discrimination.

Garrett v. *Tandy Corp.*, 295 F.3d 94, 100 (1st Cir. 2002) (citing H.R. Rep. No. 40(II), at 37 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 731).

have outlined under § 44902(b) is inconsistent with the use in Title VII cases of prima facie case methodology and the burden-shifting test. *See McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973).[21]

There were a number of other problems with the instructions given. The primary problem was that the instructions permitted liability of the air carrier to turn on the purported bias of non-decisionmakers. The jury was erroneously instructed that its focus was not to be on the Captain's bias but on any employee of the airline involved in providing information [22] to the Captain.

The deemed attribution instruction is flatly inconsistent with the leeway for the Captain's decision under § 44902(b), and it was not justified either by reference to the Restatement (Second) of Agency ("Restatement") or under *Cariglia*.

Even in interpreting Title VII, the Supreme Court has not adopted Restatement § 219 principles

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[21]The district court in *Dasrath*, without explanation, did use the *McDonnell Douglas* model, in our view incorrectly. 467 F. Supp. 2d at 445.

[22]The court also erroneously instructed that the mere providing of information constitutes discrimination if the person providing information was motivated by his or her perception of the plaintiff's race or ethnicity. The court erroneously instructed that if "*one* of the reasons that was actuating, driving, informing people," but "not the only reason," was "that person's perception of [plaintiff's] race or ethnicity," then this was a "forbidden reason." (Emphasis added.)

wholesale, as the district court purported here to do. *See Faragher* v. *City of Boca Raton* 524 U.S. 775, 797 (1998) ("The proper analysis here, then, calls not for a mechanical application of indefinite and malleable factors set forth in the Restatement . . . ."). The district court here interpreted the respondeat superior doctrine to impose liability on an air carrier for the Captain's decision based not on the issue of the Captain's bias, but on the purported discrimination of a lower-level employee who neither had authority to make the allegedly discriminatory decision nor in fact made the decision. Further, the Supreme Court has not addressed the scope of any respondeat superior liability in § 1981 claims generally[23] and we need not do so here.

The district court also erroneously invoked another doctrine from employment law, which has no applicability on the facts here as to the Captain's decision. In *Cariglia*, this court recognized that under the Massachusetts state employment discrimination statute, liability may be found where (a) a discriminating subordinate (b) causes the firing of a plaintiff by (i) intentionally giving false information

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[23]Even under the Restatement, to put the question in classic agency terms, it was not within the scope of the flight attendant's employment duties to make the decision not to transport plaintiff that day. *See Springer* v. *Seamen*, 821 F.2d 871, 881 (1st Cir. 1987), abrogated *on different grounds by Jett* v. *Dallas Indep. Sch. Dist.*, 491 U.S. 701 (1989) (requiring that in order to impute liability to an employer, an employee's actions must be "within the scope of his or her duties"); Restatement § 219(1).

to and (ii) withholding accurate information from the decisionmaker, (c) the decisionmaker's decision is significantly based on these very inaccuracies, and (d) the plaintiff has been given no opportunity to provide contrary information. *See Cariglia*, 363 F.3d at 87-88.[24] This theory was applied to a state employment law claim and is not available in a § 1981 federal claim where the air carrier has made a decision within the statutory authorization of § 44902(b).

Further, even on the *Cariglia* theory, the facts did not warrant such an instruction.[25] The Captain

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[24]Other circuits have recognized a very limited and more restrictive version of this theory under Title VII. See, e.g., Brewer v. Bd. of Trs., 479 F.3d 908, 918 (7th Cir. 2007) (imposing liability when the subordinate "has such power over the nominal decisionmaker that she is in fact the true, functional decision maker"); Hill v. Lockheed Martin Logistics Mgmt., Inc., 354 F.3d 277, 291 (4th Cir. 2004) (imposing liability if the biased subordinate is "principally responsible" for the employment decision). This circuit has not decided the issue under Title VII.

[25]We are also very doubtful about the admission into evidence of the DOT Consent Order, which closed an enforcement proceeding against American for eleven claims of racial discrimination brought by other persons under various federal statutes. Cerqueira, 484 F. Supp. 2d at 236. The rationale for admission was that the Order showed that AA was on notice of anti-discrimination policies. Id. at 238. The air carrier's knowledge of non-discrimination obligations was never at issue in this case. The carrier acknowledged it was aware of its obligations not to discriminate. To the extent the

(continued...)

consulted with State Police and TSA personnel; it was the State Police who told the Captain that the plaintiff would not reboard the aircraft for the flight. The State Police had spoken to the plaintiff. And, even if the Captain's decision was based on his own experiences with one of the three passengers and other information, it was independently grounded and not captive of whatever information (biased or not) he received from Flight Attendant Two. Even under conventional discrimination theory, the plaintiff's evidence was insufficient to show the "tainted" information was a cause for his treatment, much less a but-for cause.

For the reasons given, we reverse and remand to the district court with instructions to vacate the judgment and fees award in favor of plaintiff and enter judgment for the defendant.

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[25](...continued)
Order suggested that AA had, in other instances, engaged in discrimination, it was not relevant to the decision made by the Captain here, who is not the subject of the Order.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JOHN D. CERQUEIRA,

Plaintiff,

v. Civil Action
No. 05-11652-WGY

AMERICAN AIRLINES, INC.,

Defendant.

MEMORANDUM AND ORDER

YOUNG, J. April 9, 2007

This case arose from allegations by John D. Cerqueira ("Cerqueira") -- an American citizen of Portuguese descent -- that American Airlines ("American") intentionally discriminated against him due to his perceived race when American removed him from a flight and subsequently denied him further service. These allegations were tried before a jury beginning on January 3, 2007. On January 12, 2007, the jury returned a verdict for Cerqueira and assessed $130,000 in compensatory damages and $270,000 in punitive damages. Jury Verdict [Doc. No. 100].

On January 30, 2007, American filed two post-judgment motions. The first motion was for

judgment notwithstanding the verdict ("JNOV") that alleged the absence of sufficient evidence of intentional discrimination when analyzed under an "arbitrary and capricious" standard. Def.'s Mot. for JNOV [Doc. No. 122] at 21. The second motion sought a new trial on the same basis as the JNOV and argued that the introduction for a limited purpose of a consent order between the Department of Transportation ("DOT") and American constituted unfair prejudice. Def.'s Mot. for New Trial and Remittitur [Doc. No. 124] at 1-2. This motion also sought the remittitur of a portion of the damages awarded to Cerqueira. Id. at 1.

On February 27, 2007, this Court held oral argument on both of American's motions. The Court denied American's motion for JNOV, but it took the second motion under advisement to consider and address in writing the following three issues: (1) whether the Court erred in preventing American from referencing conformity with non-public regulations issued by the DOT; (2) whether American suffered unfair prejudice from the introduction in evidence of the consent order between American and the DOT; and (3) whether new Supreme Court precedent on the issue of punitive damages requires remittitur of the judgment. This Memorandum and Order explains the denial of American's motion for JNOV and then proceeds through the three issues taken under advisement.

I. DISCUSSION

A. The Required Evidentiary Standard

Both American's motion for JNOV and its motion for a new trial challenge this Court's jury instructions for failing to instruct that evidence of intentional discrimination must satisfy an "arbitrary and capricious" standard. Def.'s Mem. in Supp. of Mot. for JNOV [Doc. No. 123] at 9-11; Def.'s Mot. for New Trial and Remittitur at 1. American argues that a provision of the Federal Aviation Act, 49 U.S.C. § 44902(b), requires a jury to consider the evidence in light of that standard. American Mem. in Supp. of Mot. for JNOV at 7-8.

The Federal Aviation Act provides that "an air carrier, intrastate air carrier, or foreign air carrier may refuse to transport a passenger or property the carrier decides is, or might be, inimical to safety." 49 U.S.C. § 44902(b). The provision makes no explicit mention of the standard that a plaintiff must satisfy in order to overcome this statute and claim damages for a refusal to transport. See id. Further, no controlling law mandates the application of an arbitrary and capricious standard.

Despite the lack of explicit statutory or controlling legal guidance, this Court is convinced by the weight of persuasive authority that the "arbitrary and capricious" standard does in fact apply. *See Williams* v. *Trans World Airlines*, 509 F.2d 942, 946-48 (2d Cir. 1975) (stating that the test is whether the airline's determination was "rational and reasonable

and not capricious or arbitrary" under the circumstances); *Dasrath* v. *Continental Airlines, Inc.*[Dasrath II], 467 F. Supp. 2d 431, 443-44 (D.N.J. 2006) (addressing a motion for summary judgment); *Alshrafi* v. *American Airlines*, Inc., 321 F. Supp. 2d 150, 164 (D.Mass. 2004); *Schaeffer* v. *Cavallero*, 54 F. Supp. 2d 350, 351 (S.D.N.Y. 1999); *Adamsons* v. *American Airlines, Inc.*, 58 N.Y.2d42, 48 (N.Y. 1982); *MacIntosh* v. *Interface Group Massachusetts-Com, Inc.*, No. 96-01321, 1999 WL 26914, at *6-*7 (Mass. Super. Jan. 15, 1999) (Doerfer, J.). In addition, this standard likely comports with the policy behind the statutory regime that provides airlines with much discretion when they must engage in the difficult decision whether to refuse service to passengers. See Williams, 509 F.2d at 948.

Nevertheless, despite the applicability of the "arbitrary and capricious" standard to claims that seek to overcome section 44902(b), the failure here to give an explicit jury instruction respecting this standard was, on the trial record before the Court, not prejudicial error. In Alshrafi, this Court recognized that "actions motivated by racial or religious animus are necessarily arbitrary and capricious, and therefore beyond the scope of the discretion granted by Section 44902." 321 F. Supp. 2d at 162. The District Court of New Jersey reached a similar result on a motion to dismiss in *Dasrath* [*Dasrath I*], where it held that when the removal from an airline was the alleged product of "intentional racial discrimination, not of a rational determination that [the passengers'] presence was 'inimical to safety[,]'" the "[p]laintiffs

ha[d] . . . pleaded sufficiently that the removal was not the sort of rational safety measure shielded by § 44902." 228 F. Supp. 2d 531, 539-40 (D. N.J. 2002).

As a result, since this Court did instruct the jury that American's liability depended upon a finding of intentional discrimination on account of race, Trial Tr. Vol. V [excerpt 3] at 16:16-17:23, the jury verdict necessarily satisfied the standard of "arbitrary and capricious." For this reason, the Court denied American's motion for JNOV. The Court further rejects American's argument to the extent that American advances it in its motion for a new trial.

B. Exclusion of Possible Sensitive Source Information

In its motion for a new trial, American argues that the Court's ruling barring American from making any reference to Sensitive Source Information ("SSI") in non-public regulations issued by the Department of Transportation prevented American from effectively presenting its defense. Def.'s Mem. in Supp. of Mot. for New Trial and Remittitur [Doc. No. 125] at 14-15; Trial Tr. Vol. Pre-Trial 3:1-15.

This issue first came before this Court through a motion in limine by Cerqueira. Pl.'s Sixth Mot. In Limine [Doc. No. 47] at 1. Cerqueira moved to exclude any evidence that American's employees acted in conformity with standing policies or training -- the substance of which American refused or was unable to provide in discovery. Id. American opposed the

motion on the ground that it could not disclose that information due to its potential status as sensitive source information pursuant to 49 C.F.R. § 1520.9. Def.'s Opp'n to Pl.'s Sixth Mot. In Limine [Doc. No. 66].

On the surface, this motion appeared to raise the complicated and charged issues of what constitutes sensitive source information and when it may be permissibly withheld. *See Gordon* v. *Federal Bureau of Investigation*, 390 F. Supp. 2d 897, 900-01 (N.D. Cal. 2004) (exemplifying the careful consideration required of an SSI determination); *Judicial Watch, Inc.* v. *United States Dep't of Transp.*, No. Civ. 02-566-SBC, 2005 WL 1606915, at *10-*11 (D.D.C. July 7, 2005) (same). On reflection, however, this Court determined that such an inquiry would be proper only if faced with a motion to compel discovery pursuant to Federal Rule of Civil Procedure 37(a). Instead, when raised in a motion *in limine* that did not challenge the classification status but only sought to exclude non-disclosed evidence, no such searching analysis is required.

It ought first be noted that this Court finds no bad faith in American's failure to produce the requested information. American raised a genuine issue as to whether its security policies and training met the definition of sensitive source information contained in 49 C.F.R. § 1520.5. See Def.'s Opp'n to Pl.'s Sixth Mot. *In Limine* at 1-2. The Court holds that American demonstrated good faith in its concern that it must comply with the disclosure requirements of 49 C.F.R. § 1520.9. Those regulations re-

quired American to obtain the permission of the applicable governing agency (e.g., Department of Homeland Security or Department of Transportation) before releasing such information to Cerqueira and to this Court. *See id.*

Despite American's good faith compliance with these requirements, the duty to receive such permission rests with American. While the Court sympathizes with the bureaucratic morass that American apparently entered when it sought permission to disclose, this Court must also discharge its duty to effectuate the imperatives of efficiency and broad discovery. *See generally* Fed. R. Civ. P. 26, advisory committee's notes. In addition, this is not a case where the governing agency advised the Court that more time was required to balance security issues with proper discovery disclosure. *See In re September 11 Litigation*, 431 F. Supp. 2d 405, 408 (S.D.N.Y. 2006).

As a result of these considerations, this Court treated the motion *in limine* as conceptually analogous to a motion for failure to disclose discoverable material under Federal Rule of Civil Procedure 37. The Court imposed the appropriate sanction of denying the use of such undisclosed information at trial. *See* Fed. R. Civ. P. 37(c)(1); Trial Tr. Vol. Pre-Trial 3:1-5 (barring reference by American to a standard of procedure unless that standard was fully revealed and subject to complete crossexamination). The Court is unpersuaded by American that the fashioned sanction constituted too broad a remedy or caused undue prejudice. As the Court explained to

American at the Pre-Trial hearing, "[t]his is a case, a quintessential jury case where the jury can decide . . . what happened, and more importantly, why it happened. If there was racial profiling no set of standards will save American Airlines. If there was not, we're not interested in what other standards American Airlines met or did not meet." Trial Tr. Vol. Pre-trial 4:2-7. The exclusion of any reference to Sensitive Source Information was properly ordered by this Court.

C. Introduction of Consent Order

American also contends that the Court erred by admitting in evidence a Consent Order agreed to by DOT and American. American objects to this admission despite the attending instruction to the jury that limited the consideration of the document to the issue of American's notice that its employees were being complained about for racial profiling. Def.'s Mem. in Supp. of Mot. for New Trial and Remittitur at 2. American first contested the admission of this Consent Order in a motion *in limine* on November 20, 2006. Def.'s Mot. *In Limine* to Exclude Consent Order [Doc. No. 53].

On February 27, 2004, American and DOT agreed to a Consent Order closing an enforcement proceeding against American for eleven claims of racial discrimination under various federal statutes. Pl.'s Opp'n to Def.'s Mot. *In Limine* to Exclude Consent Order [Doc. No. 69], Ex. B at 1-2. The Consent Order directed American to cease and desist

from such activities and to provide civil rights training for its employees. Id. at 1. The order contained a three-page preamble followed by six provisions. In the preamble, American asserted that no violation of federal law occurred and that the removals of individuals from the airplanes were the result of reasonable security precautions. *Id.* at 2-3. In contrast, the enforcement officer of DOT contended that at least some of the passengers were removed principally because of their ethnic backgrounds. *Id.* at 3.

The preamble is followed by six enumerated clauses. *Id.* at 4-5. They are described in pithy fashion as follows: (1) DOT's approval of the "settlement"; (2) DOT's finding that American acted contrary to federal law; (3) a cease and desist clause; (4) DOT's requirement for civil rights training; (5) an enforcement clause; and (6) a recitation that the order makes no findings of violations for any individual incident. *Id.*

In addition to the Consent Order, Cerqueira attached two other documents to his motion in opposition to American's motion *in limine*: (1) the Notice of Enforcement Proceeding and Proposed Assessment of Civil Penalties; and (2) the Enforcement Complaint, which included affidavits from other alleged victims of American's discrimination. Pl.'s Opp'n to Def.'s Mot. *In Limine* to Exclude Consent Order, Ex. A.

1. Application of Federal Rules of Evidence 408 and 404(b)

In addressing this motion *in limine*, the Court considered whether the Federal Rules of Evidence would, absent an exception, bar the introduction of the Consent Order into evidence. The first question was whether a consent order qualified as a settlement agreement under Federal Rule of Evidence 408. Rule 408 bars the admission of settlement agreements to prove liability for the underlying claim. Fed. R. Evid. 408(a). Exclusion is not required, however, where the settlement agreement is used for a purpose other than proving the truth of liability, such as proof of bias or prejudice. Fed. R. Evid. 408(b). The policy justifications behind such an exclusion are two-fold. First, it illustrates Congress's desire to encourage settlement. Second, it seeks to exclude evidence that is of questionable relevance as to liability since settlement talks may well be a result of a desire not to continue with litigation. *McInnis* v. *A.M.F., Inc.*, 765 F.2d 240, 247 (1st Cir. 1985).

American did not raise the issue of Rule 408 directly, but did so indirectly by substituting the term "settlement agreement" for "consent order" in its motion *in limine*. Def.'s Mot. *In Limine* to Exclude Consent Order at 1. Cerqueira attacked this characterization on the ground that "[a] consent order is not a settlement agreement for purposes of Fed. R. Evid. 408." Pl.'s Opp'n to Def. Mot. In Limine to Exclude Consent Order at 4. The Court found little merit to Cerqueira's argument.

There is little reason to draw a distinction between consent orders and settlement agreements. *See McInnis*, 765 F.2d at 247 (noting that Rule 408 is commonly used to bar the "admission of agreements between a defendant and a third party to compromise a claim arising out of the same transaction as the one being litigated"). Support for the treatment of consent orders and settlement agreements as the same under Rule 408 may be found in the cases cited by Cerqueira. *See* Pl. Opp'n to Def. Mot. *In Limine* to Exclude Consent Order at 4. Cerqueira cites *United States* v. *Warren*, No. Civ.A.7:04 CR 00021, 2005 WL 1164195 (W.D. Va. May 17, 2005), as his primary citation for his proposition that Rule 408 does not apply. Pl. Opp'n to Def. Mot. *In Limine* to Exclude Consent Order at 4. *Warren*, however, proves the opposite proposition because the district court held that Rule 408 did apply to the Consent Order at issue. *Warren*, 2005 WL 1164195, at *3. There, the district court simply ruled that the document was being admitted for a purpose other than proof of liability, thus meeting an exception to the general rule. *Id.* The Fourth Circuit, in the oft-cited case, *Johnson* v. *Hugo's Skateway*, 974 F.2d 1408, 1413 (4th Cir. 1992), applied the same logic as the district court in *Warren* and held Rule 408 applicable to a Consent Order, which it stated could be admitted for the limited purpose of showing motive and intent. *Id.* Similarly, in *United States* v. *Gilbert*, 668 F.2d 94, 97 (2d Cir. 1981), the Second Circuit held admissible an SEC consent decree to show that the defendant was aware of SEC reporting requirements. Since

Cerqueira sought to admit the Consent Order to show motive, intent, and notice, Pl.'s Opp'n to Def. Mot. *In Limine* to Exclude Consent Order at 1, the Consent Order was properly admitted for a purpose other than proof of liability, falling within the Rule 408(b) exception.

In addition to the application of Rule 408, this Court also considered whether the introduction of the Consent Order would fall under the prohibition from using prior bad acts to prove propensity under Rule 404(b). In the case of this Consent Order, the distinction between the application of Rule 408 and Rule 404(b) is more academic than practical. Still, an analysis seeking an exception to Rule 408 ought center on the use of the settlement agreement itself for an alternate purpose such as bias or prejudice, *see McInnis*, 765 F.2d at 248 (holding the evidence inadmissible under Rule 408 because the purported purpose of impeachment was merely camouflaged causation evidence), while an analysis under Rule 404(b) is proper where the party seeks to enter evidence of prior acts encapsulated in the agreement for an alternative purpose, *see United States* v. *Landrau-Lopez*, 444 F.3d 19, 23 (1st Cir. 2006).

Federal Rule of Evidence 404(b) bars evidence of prior bad acts where they are admitted to show action in conformity with those previous acts. Fed. R. Evid. 404(b). Under this general rule, the Consent Order and the related documents that Cerqueira sought to admit would be inadmissible because American's previous acts of racial discrimination

could not be used to show that it likely committed an act of racial discrimination in the instant case.

Prior bad act evidence may, however, be admitted for other purposes in a manner similar to Rule 408. Id. The limited purposes must be "specially probative of an issue in the case ... without including bad character or propensity as a necessary link in the inferential chain." *United States* v. *Washington*, 434 F.3d 7, 12 (1st Cir. 2006) (quotation marks omitted). The admissibility of evidence under Rule 404(b) is conducted in two steps: "first, a court must determine whether the evidence in question has any special relevance exclusive of defendant's character or propensity; and second, notwithstanding its special relevance, whether the evidence meets the standard set forth in Fed. R. Evid. 403." *Landrau-Lopez*, 444 F.3d at 23 (quotation marks omitted).

In considering whether the evidence proffered presents "special relevance" of other bad act evidence, the First Circuit generally looks to two factors: "the remoteness in time of the other act and the degree of resemblance to the crime charged." *United States* v. *Frankhauser*, 80 F.3d 641, 648 (1st Cir. 1996). Here, the prior acts contained in the Consent Order occurred within the past five years and are factually similar to the alleged discrimination. Under the First Circuit's test for special relevance, these prior acts present significant probative value. *See id.*

In addition, Cerqueira did not seek to admit the evidence as propensity or character evidence. *See* Pl. Opp'n to Def. Mot. *In Limine* to Exclude Consent

Order at 1. Instead, he sought to admit the evidence to show motive, intent, and notice. *See* id. Intent and knowledge are recognized as valid limited purposes under Rule 404(b). *See United States* v. *Tse*, 375 F.3d 148, 155 (1st Cir. 2004). "Further, where, as here, the other bad act evidence is introduced to show knowledge, motive, or intent, the Rule 404(b) exceptions to the prohibition against character evidence have been construed broadly." *United States* v. *Flores Perez*, 849 F.2d 1, 4 (1st Cir. 1988). As a result, the Court held that the introduction of the Consent Order for the limited purpose was valid under Rule 404(b) because it demonstrated that American had notice of alleged discriminatory practices prior to the case at hand.

2. No Undue Prejudice under Federal Rule of Evidence 403

The inquiry, though, did not stop there. Even where evidence is admissible for an alternative purpose under Rule 404(b), it may still be excluded if it constitutes overly prejudicial evidence under Federal Rule of Evidence 403. *Landrau-Lopez*, 444 F.3d at 23. The evidence that Cerqueira sought to admit raised the possibility of undue prejudice since, even with a limiting instruction, a jury could infer racial discrimination in the current instance from the admission of a consent order settling a dispute over eleven similar complaints. The Consent Order itself mitigated some of these concerns, however, by providing a detailed discussion of the positions of both the DOT and American with respect to the

discrimination complaints. Thus, the Consent Order included American's arguments against a finding of liability for those alleged instances of racial discrimination. The existence of arguments on both sides of this issue counseled against redaction of the document for fear that redaction would itself cause the prejudice it sought to prevent.

The Court addressed the concerns of undue prejudice through a careful consideration of the content of the Consent Order and the accompanying documents. The Court resolved to admit evidence of the underlying DOT enforcement proceeding for the limited purpose of notice. Trial Tr. Vol. Pre-trial at 11:5-7; Trial Tr. Vol. IV [excerpt] at 2:7-13 (rejecting Cerqueira's request for the limiting instruction to characterize the document as being admitted to "show a discriminatory atmosphere as evidence of intent and motive"). The Court refused to allow Cerqueira to admit all three documents as he had sought -- namely the Consent Order, Notice of Enforcement Proceeding, and the Enforcement Complaint. Since the limited purpose of notice would be served through either the Consent Order or the Enforcement Complaint, the Court provided American the choice of whether it preferred the former or the latter. Trial Tr. Vol. Pre-trial at 11:11-22. American chose the Consent Order. *Id.* at 13:15-21. Further, the Court provided a strong limiting instruction to the jury when the Consent Order was admitted in evidence. Trial Tr. Vol. IV [excerpt] at 2:21-6:1.

As a result of the careful consideration of American's motion *in limine*, the need faithfully to

apply the exceptions to the general prohibition of prior bad act evidence in Federal Rule of Evidence 404(b), American's choice to admit the Consent Order instead of the Enforcement Complaint, and the limiting instruction to the jury, this Court holds that no error occurred by allowing the Consent Order in evidence for the limited purpose of notice.

D. Remittitur of Punitive Damages

Finally, American argues for a remittitur of the jury's award of $130,000 in compensatory damages and $270,000 in punitive damages by alleging that their size exceeded the rational appraisal of the evidence. Def.'s Mem. in Supp. of Mot. for New Trial and Remittitur at 15-17. American supplemented this motion to argue that the recent Supreme Court decision in *Philip Morris USA* v. *Williams*, -- U.S. —, 127 S. Ct. 1057 (2007), undermined the award of punitive damages. Def. Supplemental Mem. in Supp. of Mot. for JNOV [Doc. No. 137] at 1- 2. After brief oral argument on this issue, the Court took the matter under advisement to consider the effect, if any, of the *Philip Morris USA* holding.

In *Philip Morris USA*, the plaintiff's attorney appealed in closing arguments for the jury to consider the harm Philip Morris's alleged negligence did to other parties not before the court. 127 S. Ct. at 1061. The Supreme Court held that punitive damages may not be used to punish a defendant for harm done to nonparties. *Id.* at 1063. Punitive damages may, however, include damages awarded "in light of

potential harm" when the potential harm at issue was harm to the plaintiff. *Id.* (emphasis in original). Additionally, the Supreme Court recognized that harm to nonparties may be relevant to a determination of "reprehensibility." *Id.* at 1063-64. Such evidence may "help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public." *Id.* at 1064. A jury simply must not go further and punish the defendant for the harm done to those nonparties. *See id.* This necessarily presents a difficult inquiry that must consider the ratio of the punitive award to actual harm. *See id.* at 1062-63, 1065. It also must scrutinize the challenged conduct for indications that it created a risk that juries would incorrectly feel empowered to punish for harms done to nonparties. *See id.*

The Court notes that even a high ratio of the punitive damages to the compensatory damages does not imply that the jury included harms done to others in the calculation of its award. The jury assessed compensatory damages for the actual harm done to Cerqueira at $130,000. The punitive award of $270,000 is only slightly larger than twice the compensatory damages. Though courts are hesitant to apply a fixed ratio when considering whether a punitive award is excessive, *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408, 424-25 (2003), a two-to-one ratio does not raise excessiveness concerns. *See generally* Elizabeth Cabraser, *The Effect of State Farm v. Campbell on Punitive Damages in Mass Torts and Class Action Litigation: What Does the Immediate Post-State Farm Jurisprudence Reveal?*, in

Civil Practice and Litigation Techniques in Federal and State Courts 1725 (ALI-ABA 2005); John J. Bartko, John S. Lottier & David M. Ross, Punitive Damages: Reaction by Federal and State Courts to Developing U.S. Supreme Court Guidelines, in Civil Practice and Litigation Techniques in Federal and State Courts 1871 (ALI-ABA 2007). Likewise, it does not raise concerns that punitive damages exceeded compensatory damages in this instance. This is especially so in light of the deference that this Court must give to the jury's calculation of damages. *Whitfield* v. *Melendez- Rivera*, 431 F.3d 1, 15 (1st Cir. 2005).

American challenges Cerqueira's reference to the Consent Order in closing arguments, raising the possibility of juror confusion on the issue of punishing American for harm done to persons other than Cerqueira. Def.'s Supplemental Mem. in Supp. of Mot. for JNOV at 2-3. Counsel for Cerqueira referenced the Consent Order in his closing in this manner:

> Consider also the Department of Transportation consent order. . . . It shows that eight months before December 28, 2003, the government brought an enforcement action against American Airlines complaining of 11 separate instances where American Airlines engaged in behavior similar to that here and which the government alleged was unlawful discrimination; thus, American Airlines was on

> notice that this kind of discrimination is illegal. American Airlines knew this kind of behavior is illegal but they did it anyway.

Trial Tr. Vol. V [excerpt 4] at 20:20-21:7. American suggests that a juror could infer from this reference that he or she ought punish American for the eleven prior instances of alleged racial discrimination. *See* Def.'s Supplemental Mem. in Supp. of Mot. for JNOV at 2-3.

Contrary to American's assertion, Cerqueira's use of the Consent Order in his closing was properly within the scope of the limiting instruction discussed above relative to the admission of that document. The paragraph in the transcript preceding the challenged reference to the Consent Order addressed whether employees of American knew that removing Cerqueira from the plane based on his perceived race would constitute a violation of his civil rights. Id. at 20:13-19. The Consent Order was then referenced to demonstrate that the employees ought have had that knowledge due to the previous enforcement action. Id. at 20:20- 21:7. As discussed above, the Court properly admitted the Consent Order for the limited purpose of notice. Cerqueira's use of it within that limiting instruction does not raise the concerns addressed in *Philip Morris USA*, where counsel specifically referenced the fact that other people would likely die from Philip Morris's cigarettes. 127 S. Ct. at 1061. As a result, the Court does not find that the punitive damages awarded

indicates that the jury sought to punish American for the alleged discrimination against nonparties.

II. CONCLUSION

This was a quintessential jury trial. Cerqueira and American were both ably represented by vigorous advocates and our system gave, as it ought, the final judgment on a difficult issue of racial discrimination to the trusted institution of collective wisdom -- the jury. The jury spoke in favor of Cerqueira. Absent prejudicial error by the Court, this judgment ought stand. The Court finds no error in this case and so orders that American's Motion for a New Trial and Remittitur [Doc. No. 124] be DENIED.

SO ORDERED.

/s/ William G. Young

WILLIAM G. YOUNG
DISTRICT JUDGE

United States Court of Appeals
For the First Circuit

No. 07-1824

JOHN D. CERQUEIRA,

Plaintiff, Appellee,

v.

AMERICAN AIRLINES, INC.,

Defendant, Appellant.

Before
Boudin, Chief Judge,
Campbell, Senior Circuit Judge,
Torruella, Circuit Judge,
Stahl, Senior Circuit Judge,
Lynch, Lipez, and Howard, Circuit Judges.

ORDER OF COURT
Entered: February 29, 2008

Pursuant to First Circuit Internal Operating Procedure X(C), the petition for rehearing en banc has also been treated as a petition for rehearing before the original panel. The petition for rehearing having been denied by a majority of the panel of judges who decided the case and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and petition for rehearing en banc be denied.

TORRUELLA, Circuit Judge, dissenting. I respectfully dissent from the denial of John Cerqueira's petition for rehearing en banc. The panel opinion offers a sweeping interpretation of 49 U.S.C. § 44902(b) which goes further than any other court and, more importantly, further than Congress had intended in enacting that provision. Its application to an airline's denial of rebooking is a matter of first impression; no other court has applied it in such a manner. The issue is of exceptional importance not only for its novelty but also in light of the high-security environs in which we find ourselves today.

I.

There are two distinct parts to this case: (1) the Captain's decision to remove Cerqueira from his original flight and (2) American Airlines' refusal to rebook him on another, later flight. With respect to the first, the panel opinion concludes that Section

44902(b) endows the Captain with tremendous immunity when making difficult, split-second decisions regarding a passenger on his flight. Indeed, "even mistaken decisions are protected as long as they are not arbitrary or capricious . . . assum[ing] that . . . [a] responsible decisionmaker could credit the information provided." Slip Op. at 29. I agree that such considerations for the Captain are not only necessary but are also consistent with the underlying legislative intent:

> Congress was certainly aware that decisions under [§ 44902(b)] would in many instances probably have to be made *within minutes* of the plane's scheduled take-off time, and that the carrier's formulation of opinion would have to rest on something *less than absolute certainty.*

Williams v. *Trans World Airlines*, 509 F.2d 942, 948 (2d Cir. 1975) (emphasis added).

The decision to deny rebooking is a separate and independent decision made by the SOC manager. It is clear that Cerqueira was not going to reboard the original fight: after deciding to remove Cerqueira (and the other two passengers) from the flight, the Captain was told by the state police officers that "[t]hese three gentlemen are not traveling with you today. It's out of your hands." Slip Op. at 14-15. The rebooking decision concerned whether Cerqueira was to be rebooked on another, later flight after being cleared by the police. There was no

imperative that the SOC manager make an immediate decision with respect to rebooking; the decision was made without time pressure and with the benefit of additional information afforded by the police investigation.[1]

No other court has applied Section 44902(b) to this type of situation. All of the cases discussed in the opinion arise in a context in which a decisionmaker must determine whether to remove or bar a particular passenger from a flight because of security-related concerns. *See, e.g., Cordero* v. *Cía. Mexicana de Aviación, S.A.*, 681 F.2d 669, 672 (9th Cir. 1982) (refusal to allow plaintiff to continue on the flight after an unscheduled stop); *Williams*, 509 F.2d at 944 (refusal to transport plaintiff on his ticketed flight); *Dasrath* v. *Cont'l Airlines, Inc.*, 467 F. Supp. 2d 431, 432-33 (D.N.J. 2006) (passengers removed by pilot for security reasons); *Al-Qudhai'een* v. *Am. W. Airlines, Inc.*, 267 F. Supp. 2d 841 (S.D. Ohio 2003) (same). None have ever raised questions about future travel. In fact, in *Williams*, TWA had offered various alternate flight arrangements to the plaintiff after refusing him passage on his original flight.

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[1]The panel opinion's treatment of the SOC manager's decision conflates the fact that the decision was made quickly with the need for that decision to be made so quickly. A captain's decision regarding a security threat is necessarily a hasty one because it involves a take-off schedule and affects all of those on the plane. The SOC manager's decision enjoys the luxury of time: the next available flight was not scheduled to depart until that afternoon and Cerqueira was cleared by the state police before 9:00 A.M.

Williams, 509 F.2d at 945. In contrast, American Airlines refunded the remaining portion of Cerqueira's trip, refused to rebook him on an available flight later that afternoon, and simply informed him that the "decision had been made by AA's corporate offices." Slip Op. at 18.

This case puts the rebooking scenario squarely in front of the court. Cerqueira's complaint clearly alleges two separate claims. Yet, with little to no discussion, the panel opinion takes a major leap in extending the mantle of decisional emergency to an airline decisionmaker who is removed from the exigencies of split-second passenger safety determinations. In so doing, the opinion transforms Section 44902(b)'s exceptional immunity into a legal framework that may apply in all airline decisions. After concluding that Section 44902(b) governs the SOC manager's decision, the opinion states that the *McDonnell Douglas* burden-shifting methodology for evaluating indirect evidence of discriminatory intent is "inconsistent" with the Section 44902(b) test. Slip Op. at 37. The opinion goes on to conclude that Cerqueira's challenge to the rebooking decision fails because "[t]here is no evidence that the SOC manager's decision was based on race discrimination . . . there is no evidence that the SOC manager was aware of the plaintiff's appearance, race, or ethnicity . . . [and thus] the § 1981 claim against the SOC manager fails." Slip Op. at 36.

The *McDonnell Douglas* burden-shifting framework was crafted by the Supreme Court specifically to ameliorate the difficulties in obtaining direct

evidence of racial discrimination. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973). Accordingly, we have used that framework in evaluating § 1981 claims. *See, e.g., Straughn* v. *Delta Air Lines, Inc.*, 250 F.3d 23, 33 (1st Cir. 2001); *Oliver* v. *Digital Equip. Corp.*, 846 F.2d 103, 107 (1st Cir. 1988); *T&S Serv. Assoc., Inc.*, v. *Crenson*, 666 F.2d 722, 724 (1st Cir. 1981). In requiring a plaintiff to submit direct evidence of discriminatory animus in the rebooking scenario, the opinion uses Section 44902(b) to effectively exempt a broad swath of airline decisions from the *McDonnell Douglas* burden-shifting methodology. Such was not the intent of Congress in promulgating Section 44902(b), and the opinion fails to provide a compelling rationale for doing so. I am firmly opposed to the expansion of the airline's immunity in this manner.

II.

Additionally, I think that the panel opinion erroneously concludes that "no properly instructed jury could return a verdict against the air carrier." Slip Op. at 3. In so concluding, the opinion improperly encroaches upon the fact-finding responsibilities of the jury. *See, e.g., United States* v. *Nascimento*, 491 F.3d 25, 46-47 (1st Cir. 2007) ("Sifting through conflicting testimony and determining where the truth lies is the sort of work that falls squarely within the jury's province."). Under either a § 1981 burden-shifting analysis or the Section 44902(b) arbitrary and capricious standard, a properly instructed and

reasonable jury could find in favor of Cerqueira with respect to the rebooking decision.

Applying *McDonnell Douglas*, a reasonable jury could conclude that the denial of rebooking was based on the perception that Cerqueira was from the Middle East. The SOC manager based his decision not to rebook Cerqueira on the security information provided by the Captain, a combination of his personal concerns and those of his flight attendants. Trial testimony and record evidence indicated that at least one flight attendant's information may have been race-based. While we remove any responsibility on the part of the Captain to conduct an inquiry into representations made by other air carrier employees, there is no convincing rationale for extending that consideration to decisionmakers such as the SOC manager who are not compelled by exigent circumstances. After listening to the testimony of the airline employees and reviewing the evidence, a jury should determine whether it believes that the airline acted out of legitimate safety concerns in denying rebooking, or if the actions were based on race discrimination.

Alternatively, even if the Section 44902(b) standard applies to the SOC manager's decision, a reasonable jury could conclude that the airline's failure to inquire into Cerqueira's status before issuing its denial was arbitrary and capricious.[2]

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[2]Although the panel opinion emphasizes the "short proximity" (i.e. "within minutes") between the Captain's

(continued...)

While we do not impose a burden on the Captain to conduct an investigation, the SOC manager can be held to greater scrutiny without compromising safety. Cerqueira was released by the police with no charges; those facts were within the knowledge of the airline when the decision not to rebook was made, and, in any event, available sufficiently prior to the afternoon flight, to allow American Airlines time to rationally consider its rebooking determination. The failure of American Airlines to do so and its refusal to give any reason for acting in such an apparently arbitrary manner, when placed against the background of the earlier evidence, presents sufficient facts to have the rebooking issue go before a properly instructed jury. A reasonable jury "might have concluded that the [airline] acted unreasonably in excluding [the passenger] without even the most

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[2](...continued)
decision not to allow Cerqueira to fly and the SOC manager's decision to deny rebooking, that assertion is unsupported by the record. *See* Slip Op. at 36. Prior to the flight's original estimated departure time of 6:35 A.M., Cerqueira was removed from the flight and taken by the police for questioning. He was released by the police around 9:00 A.M. Although the Captain had contacted the SOC to provide a "full report on the security issues and to notify them that the flight would not be departing on time" it was not until 9:01 A.M. that the customer service manager, "per SOC [manager]," made an entry stating that Cerqueira was to have his ticket refunded. Several minutes later, another entry stated: "Do not rebook on AA." Slip Op. at 11, 17.

cursory inquiry into the complaint against him." *Cordero*, 681 F.2d at 672.

III.

I am deeply troubled by the legal implications of the opinion and, therefore, dissent from the denial of en banc review.

LIPEZ, Circuit Judge, dissenting. I respectfully dissent from the denial of en banc rehearing for all of the reasons Judge Torruella sets forth in his dissent. I write separately to add one additional point.

We recognized in *Cariglia* v. *Hertz Equip. Rental Corp.*, 363 F.3d 77, 83 (1st Cir. 2004), that corporate liability for discrimination could attach if a neutral decisionmaker relied on information that was inaccurate, misleading, or incomplete because of another employee's discriminatory animus. The Captain testified that he conveyed to the SOC what the flight attendants had reported to him, and the jury had evidence before it supporting an inference that at least one flight attendant's information may have been race-based. As such, the plaintiff would be entitled to rely on a *Cariglia* theory that corporate liability could attach because the SOC manager relied on information that was inaccurate, misleading, or incomplete because of a flight attendant's discriminatory animus.

As the panel decision notes, we have not previously applied this theory of corporate liability to a discrimination claim under 42 U.S.C. § 1981.

However, we have noted that the standards of liability under § 1981, Title VII, and the Massachusetts state employment discrimination statute (under which *Cariglia* arose) are substantially identical. *Villanueva* v. *Wellesley College*, 930 F.2d 124, 127 n.2 (1st Cir. 1991); *see also T & S Serv. Assocs., Inc.* v. *Crenson*, 666 F.2d 722, 724 (1st Cir. 1981) (applying the *McDonnell Douglas* framework, developed under Title VII, in a nonemployment § 1981 case); *cf. Danco, Inc.* v. *Wal-Mart Stores, Inc.*, 178 F.3d 8, 13 (1st Cir. 1999) (noting that the list of activities protected under § 1981 now includes "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship," tracking the language of Title VII's prohibition on discrimination with respect to "compensation, terms, conditions, or privileges of employment"). Against this backdrop, the panel's conclusion that *Cariglia* should not extend to the rebooking decision is dubious.

The panel concludes that "[t]he § 1981 claim against the SOC manager's decision was derivative of the § 1981 claim against the Captain's decision" because the SOC manager had only the information conveyed to him by the Captain. I respectfully submit that this conclusion is flawed. The SOC manager made a separate decision as to whether the passenger could be rebooked on a flight that was scheduled to depart hours later. In doing so, he may have relied – perhaps unwittingly – on information tainted by a flight attendant's racial animus. While

the law affords the Captain great latitude because his decision must be made quickly, the SOC manager – and American Airlines as a whole – is not entitled to piggyback on that first decision and thereby multiply any discriminatory animus underlying it. This conflation of the Captain's decision and the SOC manager's decision should have been considered and corrected by the en banc court. Accordingly, I dissent from the denial of en banc review.

By the Court:

/s/
Richard Cushing Donavon, Clerk

United States Court of Appeals
For the First Circuit

No. 07-1824

JOHN D. CERQUEIRA,

Plaintiff, Appellee,

v.

AMERICAN AIRLINES, INC.,

Defendant, Appellant.

ERRATA SHEET

The opinion of this Court issued on January 10, 2008 is amended as follows:

On page 17, line 3, replace "and" with ", which included the Captain's information from"

On page 17, line 14, add as the last sentence of the paragraph, "It is the decision not to rebook that morning which is at issue."

On page 28, line 11, add "by the Captain"after "refuse transport"

On page 28, line 14, replace "decisionmakers" with "Captain"

On page 29, line 1, replace "decisionmakers" with "Captain"

On page 29, line 9, replace "other decisionmaker" with "the SOC manager, whose prompt decision not to rebook was based on the Captain's decision"

On page 36, line 3, replace "about the situation" with "provided by the Captain"

On page 36, line 5, after "Boston." insert the following:

> The § 1981 claim against the SOC manager's decision was derivative of the § 1981 claim against the Captain's decision. There is no evidence that the SOC manager's decision was based on race discrimination.

On page 36, line 5, replace "is no evidence" with "is also no evidence"

On page 36, line 8, insert "within minutes" after "decided"

On page 36, line 8, replace "to deny rebooking." with "to deny rebooking or that the SOC

manager's following the Captain's decision was motivated by race."

On page 36, line 8, at the conclusion of the sentence that now ends "to deny rebooking or that the SOC manager's following the Captain's decision was motivated by race." insert the following footnote:

> This case does not concern a situation where a SOC manager's decision to deny rebooking was not made based on the Captain's safety concerns and not made in short proximity to the Captain's decision not to allow plaintiff to fly.

On page 36, line 9, replace "indication" with "evidence"

On page 36, line 11, add as the last sentence of the paragraph, "As a result, the § 1981 claim against the SOC manager fails, and § 1981 imposed no further duties on him."

On page 37, line 10, replace "an air carrier" with "the Captain"

On page 37, line 14, insert "Captain's" before "decision"

On page 38, line 8, immediately after the words "providing information" insert the following footnote:

> The court also erroneously instructed that the mere providing of information constitutes discrimination if the person providing information was motivated by his or her perception of the plaintiff's race or ethnicity. The court erroneously instructed that if "one of the reasons that was actuating, driving, informing people," but "not the only reason," was "that person's perception of [plaintiff's] race or ethnicity," then this was a "forbidden reason." (Emphasis added.)

On page 38, line 9, replace "decisionmakers" with "Captain"

On page 38, line 9, through page 38, line 22, delete the following text:

> (We discuss this error further.) The instructions also erroneously appeared to equate acting based on any perceptions of a person's race or ethnic heritage with illegal discrimination. Race or ethnic origin of a passenger may, depending on context, be relevant information in the total mix of information raising concerns that transport of a passenger "might be" inimical to safety. The court also erroneously instructed that the mere providing of information constitutes discrimination if the person providing information was motivated by his or her perception of the plaintiff's race or ethnicity. The court erroneously instructed

> that if "one of the reasons that was actuating, driving, informing people," but "not the only reason," was "that person's perception of [plaintiff's] race or ethnicity," then this was a "forbidden reason." (Emphasis added.)

On page 39, line 1, replace "We return to the" with "The"

On page 39, line 1, through page 39, line 2, delete the following text: "problem with the instructions. Not only is that type of "

On page 39, line 2, replace "instruction flatly" with "instruction is flatly"

On page 39, line 3, replace "with § 44902(b), it" with "with the leeway for the Captain's decision under § 44902(b), and it"

On page 39, line 13, insert "or the Captain's decision" after "air carrier"

On page 39, line 13, insert "not on the issue of the Captain's bias, but" after "based"

On page 40, line 3, replace "facts here." with "facts here as to the Captain's decision."

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(2)

No. 07-1495

Supreme Court, U.S.
FILED
JUL 29 2008
OFFICE OF THE CLERK

In The
Supreme Court of the United States

JOHN D. CERQUEIRA,

Petitioner,

v.

AMERICAN AIRLINES, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF IN OPPOSITION

MICHAEL A. FITZHUGH
FITZHUGH & MARIANI LLP
155 Federal Street, Suite 1700
Boston, Massachusetts 02110-1727
(617) 695-2330

MICHAEL V. POWELL
Counsel of Record
LOCKE LORD BISSELL
& LIDDELL LLP
2200 Ross Avenue, Suite 2200
Dallas, Texas 75201-7726
(214) 740-8520

Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

49 U.S.C. § 44902(b) authorizes air carriers "to refuse to transport a passenger or property the carrier decides is, or might be, inimical to safety." For many years, the lower appellate courts have held § 44902(b) protects an air carrier's decision to refuse transportation to a passenger because of the carrier's safety concerns unless the refused passenger proves the carrier's decision to have been arbitrary or capricious at the time it was made.

Within that unique context of an air carrier's decision to refuse to transport a passenger for safety reasons, the questions presented are:

1. Whether the decision of the pilot-in-command of a commercial airliner to deny transport to a passenger may create liability for the air carrier when the decision was made based on the pilot's good-faith, reasonable belief that the passenger presented a safety risk, despite a claim that a non-decision-making subordinate's report to the pilot about the passenger's conduct was tainted by a discriminatory stereotype?

2. Whether the express authority granted by § 44902(b) should be judicially curtailed when a plaintiff alleges racial discrimination, by replacing the plaintiff's burden to prove the carrier's decision was "arbitrary or capricious" with the burden-shifting

QUESTIONS PRESENTED – Continued

and potential presumption framework outlined for Title VII cases in *McDonnell Douglas Corp. v Green*, 411 U.S. 792 (1973)?

3. Should the authority granted air carriers by § 44902(b) simply vanish from the case when a passenger asserts a decision to deny transport was tainted by race, so that the passenger's case against the air carrier is then tried like an ordinary case of alleged discrimination in an office or restaurant, on the theory that if the air carrier's decision was influenced in any respect by unlawful discrimination, it would be *per se* arbitrary and capricious?

4. In the event the Court grants certiorari, American would present the additional question whether the district court erred by admitting a Department of Transportation Consent Decree into evidence before the jury. Because the First Circuit decided the case on other grounds, it did not reach this question except to note it was "very doubtful" about the district court's admission of the Consent Decree. *See* Pet. App. 41a n. 25.

CORPORATE DISCLOSURE STATEMENT

The caption of the case contains the names of all parties to the proceeding in the court whose judgment is sought to be reviewed.

The parent corporation of Respondent American Airlines, Inc. is AMR Corporation, which is publicly-traded.

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II. There is no circuit split on whether *McDonnell Douglas* should apply in cases governed by 49 U.S.C. § 44902(b). To apply the burden shifting and presumption framework of *McDonnell Douglas* in these circumstances would conflict with established jurisprudence that a plaintiff challenging an air carrier's safety decision under § 44902(b) must prove that decision to have been arbitrary or capricious at the time it was made 15

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INTRODUCTION

Petitioner Cerqueira presents this case as if it were a routine alleged racial discrimination case arising on a factory floor or in an office, restaurant, or hotel. Indeed, Petitioner's first Question for Review suggests this case would be a good one to examine the issue of "subordinate bias liability" in Title VII cases, on which the Court originally granted certiorari in *EEOC v. BCI Coca-Cola Bottling Co.*, 450 F. 3d 476 (10th Cir. 2006), *cert. dism'd,* 127 S. Ct. 1931 (2007).

As the First Circuit's opinion explains, this is not that kind of case. This case is governed by 49 U.S.C. § 44902(b), by which Congress conferred on air carriers, such as Respondent American Airlines, Inc. ("American"), the authority to "refuse to transport a passenger or property the carrier decides is, or might be, inimical to safety." 49 U.S.C. § 44902(b). Congress enacted § 44902(b) as one important means of implementing its policy that "assigning and maintaining safety [ranks] as the highest priority in air commerce." 49 U.S.C. § 40101(a)(1).

Section 44902(b) recognizes that an air carrier has a duty to protect the lives of *all* passengers and crew members aboard a commercial airliner. If the pilot-in-command of an airliner concludes, based on information that comes to him, that there "is, or might be" a safety hazard aboard his aircraft, § 44902(b) authorizes him to act to protect the safety

of the entire aircraft by removing a passenger from the aircraft before flight, provided only that his decision to do so was neither arbitrary nor capricious. It is better for the pilot to err by refusing on the ground to transport a suspicious passenger than it would be for all aboard the aircraft greatly to regret the pilot's decision not to do so after the aircraft has climbed to 30,000 feet.

Lower appellate courts, including the First Circuit in this case, uniformly have so interpreted § 44902(b).[1] *See, e.g., Cerqueira v. American Airlines, Inc.*, 520 F. 3d 1 (1st Cir. 2008) (Pet. App. 1a-42a); *Cordero v. Cia Mexicana de Aviacion, S.A.*, 681 F. 2d 669 (9th Cir. 1982); *Williams v. Trans World Airlines*, 509 F. 2d 942 (2d Cir. 1975); *Adamsons v. American Airlines, Inc.*, 444 N.E. 2d 21 (N.Y. 1982). Petitioner does not dispute this long-standing interpretation of § 44902(b). *See* Pet. 30-31.

Because this is a case falling within § 44902(b) and is fraught with the considerations Congress addressed in § 44902(b), the case would be a poor vehicle for this Court to examine issues that arise almost always in the far different, less dangerous context of employment discrimination cases. Furthermore, contrary to Petitioner's arguments, there

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[1] Prior to 1994, § 44902(b) was codified at 49 U.S.C. § 1511(a). *See* Pet. App. 22a n. 12.

are no circuit conflicts on the proper meaning or application of § 44902(b).

STATEMENT OF THE CASE

The First Circuit's opinion objectively summarizes the confluence of information on which Captain Ehlers, the pilot-in-command of American Flight 2237 scheduled to fly from Boston's Logan Airport to Fort Lauderdale early on December 28, 2003, based his decision to have state police providing security at Logan to remove Petitioner Cerqueira and two other passengers from the airplane prior to flight.[2] *See* Pet. App. 3a-16a. The other two passengers removed (neither of whom sued American) were sitting next to Cerqueira in one of the plane's emergency exit rows.

After police officers removed the three passengers from the aircraft, Captain Ehlers required all other passengers on the fully-loaded aircraft to deplane with their carry-on bags. The pilot also directed American's ground crew to empty the plane of all checked bags and cargo. He then had the aircraft searched by explosive-detecting dogs. Pet. App. 12a-13a. The events of that early morning so unnerved

[2] By Federal Aviation Regulation, "the pilot-in-command of an aircraft is directly responsible for, and is the final authority as to, the operation of that aircraft." 14 C.F.R. § 91.3; Pet. App. 24a.

the three veteran flight attendants assigned to Flight 2237 that they refused to work the flight even after the pilot cleared it to resume. American had to summon replacement flight attendants. Pet. App. 13a-14a.

American adopts the First Circuit's statement of the facts at Pet. App. 3a-18a by reference and presents only a summary here. American's pilot and each of the flight attendants had troubling experiences that early morning at Logan with one or more of Petitioner Cerqueira or the two other men seated next to him in an emergency exit row of the aircraft. As a result, after the flight was fully loaded and the jet bridge pulled away, the pilot met with his flight attendants to discuss their concerns. Based on his own experience with one of the other two passengers in the exit row that morning (*i.e.*, not Cerqueira) and reports he received from the flight attendants, the Captain decided not to taxi the airplane to the runway for takeoff. Instead, he re-called the jet bridge and took the flight safety precautions described above, *i.e.*, have the police remove the three passengers whose behaviors had caused concern, empty the aircraft, and have the aircraft searched by explosive-detecting dogs. *See* Pet. App. 9a-13a.

Captain Ehlers' personal encounter with one of the other two passengers, described as a man with a ponytail, occurred as the Captain arrived that morning at the gate from which Flight 2237 was to depart.

This passenger approached Ehlers and asked if he was the captain for the Fort Lauderdale flight. The Captain responded he was, and the passenger said: "Good. I'm going with you. We're going to have a good day today." Captain Ehlers, who has been employed by American since 1986, testified his conversation with the passenger with the ponytail was "probably one of the most odd exchanges that I've ever had with anyone in my whole career, and it concerned me greatly." Pet. App. 4a-5a.

After Captain Ehlers went on board the aircraft to prepare it for flight, he telephoned Flight Attendant Sally Walling, a thirty-seven year veteran with a stellar reputation (Pet. App. 10a), and asked her to check on the location of the ponytailed man. She reported he was sitting in an exit row with Petitioner Cerqueira and another man. Walling reported her perception that the three men in the exit row appeared to be traveling together. Pet. App. 5a-6a.

Walling then expressed her concerns to Captain Ehlers about Petitioner Cerqueira, sitting in the exit row with the man with a ponytail. She said early that morning, Cerqueira had approached her at the gate and was "very hostile and extremely insistent that his seat be switched to an exit row seat." Pet. App. 6a-7a. She explained to Cerqueira at the time that she was not a gate agent and could not help him. She said Cerqueira then sat down near the gate and glared at her, making her very uncomfortable. Pet. App. 7a. As Walling later walked down the jet bridge with the other two flight attendants to

take their positions on the plane, she told them Cerqueira's conduct at the gate had made her uncomfortable. Pet. App. 7a n. 4.

Flight Attendant Walling also reported her perception that Cerqueira, seated in coach, had boarded with first class passengers (which was later determined to be incorrect), and that he went into a lavatory and stayed for an extended period immediately after he boarded the aircraft. After receiving this information, Captain Ehlers sent the co-pilot to check the lavatory for explosives or other contraband. The co-pilot found nothing. Pet. App. 7a. Walling also stated her observation that Cerqueira had "an obvious interest in flight attendant duties; someone might call it staring." Pet. App. 9a. Walling reported that other passengers had expressed discomfort with statements the man with the ponytail made on the aircraft. Pet. App. 10a.

Flight Attendant Lois Sargent reported to the Captain that she gave the safety briefing to passengers sitting in the emergency exit rows, including Cerqueira, the ponytailed man, and the third man sitting with them. She said that during and after the briefing, the other two men acted bizarrely, and laughingly asked questions such as: "Is this how you want me to do it," and "Where do you want me to put the door." She reported that Cerqueira appeared to find his seat mates' antics amusing. From Sargent's personal observation, these men did not take the emergency exit row briefing seriously. She considered their behavior during the safety briefing

so unusual that she went to the front of the plane to report it to Captain Ehlers. Pet. App. 8a-9a.

The third flight attendant, Ms. Milenkovic, was assigned to the front of the aircraft. When the ponytailed man boarded the aircraft, she observed him look into the cockpit and ask Captain Ehlers: "Are you our Captain." She thought his question strange since it was obvious Captain Ehlers was the captain. Captain Ehlers also thought it strange because he had already told the same passenger in the gate area that he was the plane's captain. Pet. App. 9a.

Mr. Cerqueira's Petition stresses that in hindsight, certain of the American crew's perceptions that morning were shown to be incorrect. For example, Cerqueira was not traveling with the man with a ponytail or that man's companion and did not know them, and Cerqueira did not board until his boarding group was called. Cerqueira also points out that others of his actions – such as visiting the lavatory – certainly admit to innocent explanations. But that is not the proper way to view the collective information Captain Ehlers possessed that morning.[3] As

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[3] As Judge Weinfeld observed in a similar case, a captain's decision "must be considered against the totality of the facts as they existed at the time the captain took his action. His decision cannot be viewed in isolation separate from events that preceded it but in proper perspective as of the time of their occurrence and in relationship to one another." *Zervigon v. Piedmont Aviation, Inc.*, 558 F. Supp. 1305, 1306 (S.D.N.Y.), *aff'd*, 742 F. 2d 1433 (2d Cir. 1983).

the First Circuit held, given the confluence of information about the behaviors of the three passengers Captain Ehlers observed personally (in the case of the ponytailed man) and received from his flight attendants immediately before he was to pilot Flight 2237 to Fort Lauderdale, no reasonable jury, properly instructed, could find Captain Ehlers' decisions to protect the safety of all of his passengers and crew to have been arbitrary or capricious.

Cerqueira also challenges the decision that same morning to deny him re-booking on a later American flight and to refund his ticket price. That decision was made by Craig Marquis, the Dallas, Texas-based manager of American's Systems Operation Center ("SOC"), who made his decision after receiving a telephoned summary of the events causing the delay of Flight 2237 from Captain Ehlers. Pet. App. 16a-17a.

Petitioner Cerqueira, who testified he is of Portuguese descent, contended at trial that Flight Attendant Walling's report to Captain Ehlers was racially stereotyped because she mistakenly perceived him to be of Middle Eastern origin and thus incorrectly associated him with the ponytailed man and that man's companion because of the similarities of their "Middle Eastern" appearances. It is an unusual aspect of this case that Petitioner contends he was discriminated against because he was "perceived

to be" Middle Eastern, not because he *is* Middle Eastern.

REASONS TO DENY THE PETITION

I. This case is not within the *EEOC v. BCI Coca-Cola Bottling Co.* line of cases involving the influence of an allegedly-biased non-decision maker in employment decisions. Rather, this case is governed by § 44902(b), which pertains uniquely to air carrier safety decisions.

This case does not present a good vehicle for the Court to examine the issue of non-decision-maker bias in employment discrimination cases that Petitioner heralds as his first "issue presented." Pet. 13-21. For his references to circuit opinions addressing that issue, Petitioner cites Title VII employment discrimination cases and a few § 1981 cases arising outside the context of employment, such as in retail sales or public accommodations contexts; but he cites no other cases involving an *air carrier's* refusal to transport a passenger for safety reasons governed by § 44902(b). There are none.

As the First Circuit correctly held, this case is governed primarily by the different legal regime of § 44902(b), borne from the critical need for air safety, rather than principally by Title VII or the other discrimination statutes. The statutory language of § 44902(b) is straightforward. The statute says it is

the air carrier's decision whether to refuse to transport a passenger for safety reasons, and it says the carrier may refuse to transport if the carrier decides a passenger "is, or might be, inimical to safety."

Starting with the Second Circuit's decision in *Williams v. Trans World Airlines*, 509 F. 2d 942 (2nd Cir. 1975), the lower courts uniformly have held that

> [t]he test of whether the airline properly exercised its power under [§ 44902(b)] to refuse passage to an applicant or ticket-holder rests upon the facts and circumstances of the case as known to the airline at the time it formed its opinion and made its decision and whether or not the opinion and decision were rational and reasonable and not capricious or arbitrary in the light of those facts and circumstances. They are not to be tested by other facts later disclosed by hindsight.

509 F. 2d at 948. The First Circuit agreed with and adopted the same test in this case. Pet. App. 27a-28a. *See also Adamsons*, 444 N.E. 2d at 24-25. That test does not apply in any of the employment, retail service, or public accommodation discrimination cases Petitioner cites on pages 15-19 of his Petition, and that is the first reason why this case would not be a good one for the Court to examine the issue of non-decision-maker bias or influence in ordinary discrimination cases.

The second reason why this case is different, and a poor choice for examining the subordinate bias

issue Petitioner proffers, is that the factual circumstances of this case – and of air carrier refusals to transport for safety in general – are very different from an employment decision made in a factory or office, or a discrimination case in a restaurant or hotel.

When an air carrier makes a decision to refuse to transport a passenger for safety reasons, it thereby acts to protect the lives of all other passengers and crew members aboard the aircraft. The consequences of a timid or wrong decision can be catastrophic. That consideration does not apply in Title VII or § 1981 cases arising in employment or retail service environments.

Furthermore, in *EEOC v. BCI Coca-Cola Co.* and the other employment cases Petitioner cites, the supervisors whose decisions were at issue had the twin luxuries of time for investigation and consultation, and personal familiarity with the work and records of the subordinates and employees involved. That was not the situation in this case. As is usual in airline refusal to transport for safety situations, American's pilot-in-command had to make a decision in the minutes before takeoff about passengers he had never before seen. He was occupied with pre-flight checklists and otherwise preparing the aircraft for flight. Captain Ehlers properly considered and relied on the consistent reports of three veteran flight attendants who, unlike himself (except for his earlier encounter with the man with a ponytail), were in direct contact with the passengers.

Petitioner's suggestion that the First Circuit's decision below conflicts with the Ninth Circuit's decision in *Cordero* is incorrect. Unlike the jury in this case, the *Cordero* jury was properly instructed about § 44902(b). *See Cordero*, 681 F. 2d at 671 n. 2 & 672.[4] In affirming a judgment for consequential damages based on the jury's verdict, the Ninth Circuit observed that the "jury might have concluded that Mexicana acted unreasonably in excluding Cordero without even the most cursory inquiry into the complaint against him." That states merely an observation about the evidence, not a holding that the pilot-in-command of an aircraft must halt his

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[4] American requested jury instructions in this case similar to those given the jury in *Cordero*, but such instructions were refused by the district court, a ruling the First Circuit found to have been reversible error. Pet. App. 31a-34a. The *Cordero* jury, on the other hand, was properly instructed as follows:

> An airline is justified in refusing to transport a passenger if that transportation in the opinion of the airline, and that again, means the pilot, would be inimical to the safety of the flight. In other words, in judging the legality of a denial of passage, we look to the opinion of the airline pilot, and that opinion controls, if it's a reasonable opinion based on the facts and circumstances as they appear to the pilot at the time that the decision was made. It is not what is reasonable in the after-light, but what appears to be reasonable at the time. On the other hand, if the passenger is excluded because the opinion of the pilot is arbitrary or capricious and not justified by any reason or rational appraisal of the facts, then the denial of passage is discriminatory.

Cordero, 681 F. 2d at 671 n. 2.

preparations for flight and conduct a personal investigation into reports he has received from other crew members about their observations of passenger behavior. Indeed, in *Cordero*, the Ninth Circuit expressly held that "[t]here is . . . no duty to conduct an in-depth investigation into a ticket-holder's dangerous proclivities." 681 F. 2d at 672. The First Circuit held the same in this case. Pet. App. 29a-30a. So did the Second Circuit in *Williams*, 509 F. 2d at 947, and the Court of Appeals of New York in *Adamsons*, 444 N.E. 2d at 25. There is no conflict among the lower courts for this Court to resolve about the pilot's duty to conduct a personal investigation.

Petitioner's claim that the opinion below conflicts with the position of the United States Department of Transportation also is incorrect. Petitioner misquotes the DOT Consent Order to which he refers on page 19 of his Petition. That Consent Order states, in a footnote, that the DOT's *Enforcement Office* "strongly disagrees" with American's position and that it is the DOT *Enforcement Office's* "position that a pilot-in-command's failure to inquire independently into the reasons for such action is inconsistent with carrier's legal obligations." *American Airlines, Inc.*, DOT No. OST 2003-15046, Consent Order, June 21, 2004 at n. 2.

The proceeding before the DOT was resolved by settlement in a Consent Order. The presiding administrative law judge ("ALJ") stated American's and the Enforcement Office's respective positions about the pilot's duty to conduct a personal investigation. Petitioner's quotations on pages 19-20 of the Petition

are from the ALJ's recitation of the DOT *Enforcement Office's* position, *i.e.*, the claims DOT enforcement counsel asserted in the proceeding. The ALJ rendered no ruling on the disputed issue, nor was the issue addressed by any higher decision-making authority within DOT. Consequently, Petitioner cannot properly characterize his quotations as the "position" of DOT.

As the First Circuit below and the Courts in *Cordero*, *Williams*, and *Adamsons* uniformly have recognized, it would frustrate the purpose of § 44902(b) to require a pilot-in-command to conduct a personal investigation of reports of passenger behavior received from flight attendants, gate agents, or others. Furthermore, there is a significant safety consideration. If there are would-be highjackers or terrorists aboard the aircraft, it is not prudent for the pilot to leave the cockpit to question them in a crowded aircraft, among all other passengers. For the most part, pilots are not trained to conduct such investigations. It is far better to do what American's Captain Ehlers did in this case – to ask the trained, equipped police officers assigned to the airport to separate the individuals to be questioned from the aircraft and other passengers and then to conduct an investigation for which the police are trained.

II. There is no circuit split on whether *McDonnell Douglas* should apply in cases governed by 49 U.S.C. § 44902(b). To apply the burden shifting and presumption framework of *McDonnell Douglas* in these circumstances would conflict with established jurisprudence that a plaintiff challenging an air carrier's safety decision under § 44902(b) must prove that decision to have been arbitrary or capricious at the time it was made.

By his second issue, Petitioner contends the Court should grant certiorari to hold the *McDonnell Douglas* framework for presentation of proof in indirect evidence Title VII cases,[5] with its attendant allocations of intermediate burdens of production and potential presumptions, should also apply in trials of air carrier refusals to transport governed by § 44902(b). Petitioner cites one Ninth Circuit opinion, not published in the FEDERAL REPORTER, and several district court decisions as allegedly conflicting with the First Circuit's holding that the district court erred by giving *McDonnell Douglas* burden-shifting jury instructions in the trial below. Pet. App. 37a-39a.[6]

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[5] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

[6] Petitioner devotes several pages of his Petition to discussing cases in which courts have applied the *McDonnell Douglas* framework outside the context of employment discrimination cases. Pet. 22-27. But none of those cases apply that framework to the different context at issue here – an air carrier's denial of service to a passenger because of safety considerations.

There is no circuit conflict. The First Circuit's opinion in this case is the first court of appeals to address the issue.

The Ninth Circuit's decision that Petitioner cites, which is *Simmons v. American Airlines, Inc.*, 34 F. App'x 573 (9th Cir. 2002), neither mentions § 44902(b) nor addresses how the *McDonnell Douglas* framework might apply to that statute's plain statement that "an air carrier . . . may refuse to transport a passenger or property the carrier decides is, or might be, inimical to safety." Although the Ninth Circuit's *Simmons* opinion cites *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), which is in the Court's *McDonnell Douglas* line of Title VII cases, and discusses intermediate burden-shifting, the holding of *Simmons* was only that there existed a genuine issue of material fact and the district court had erred by granting summary judgment. That holding falls far short of creating any circuit split or conflict with the reasoned opinion of the First Circuit in this case.[7]

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[7] The district court cases Petitioner cites are not in disarray and do not demonstrate confusion in the lower courts. Pet. 25. The opinion in *Dasrath v. Continental Airlines, Inc.*, 467 F. Supp. 2d 431 (D.N.J. 2006), granted summary judgment for Continental Airlines on facts very similar to those in this case, based on § 44902(b). Although the First Circuit criticized the *Dasrath* court's following *McDonnell Douglas* burden-shifting in its opinion, the *McDonnell Douglas* structure was not essential to, and did not form the basis of, the *Dasrath* court's grant of summary judgment to Continental. The unpublished decision in

(Continued on following page)

Petitioner contends this case provides a good vehicle for examining application of the *McDonnell Douglas* framework to § 44902(b) cases because, according to Petitioner, this case can be bisected into "two separate claims of discrimination that would be resolved under different prongs of the *McDonnell Douglas* framework." Pet. 27. But Petitioner's argument is one of great factual complication and, as the First Circuit concluded after its study of the factual record, is not supported by the evidence presented at the trial of this case.

American has already discussed Captain Ehlers' decision to have Petitioner removed from Flight 2237, which Petitioner asserts was the "first" of two independent decisions that morning. For the reasons set forth in the First Circuit's decision and in this Brief in Opposition, the Captain's decision was neither arbitrary nor capricious. Rather, Ehlers' decision was an example of the attentiveness to air carrier safety

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Thompson v. Southwest Airlines Co., 2006 WL 287850 (D.N.H. 2006), did not involve § 44902(b) or the safety reasons behind that statute. The *Thompson* plaintiff sued Southwest for alleged discrimination for requiring her to purchase two seats because she was a "customer of size." Although the court mentioned the pilot's discretion under § 44902(b) in *Huggar v. Northwest Airlines, Inc.*, 1999 WL 59841 (N. D. Ill. 1999), the issue in the case was whether the passenger was discriminated against because of his race when he was removed from the airplane after he started a physical altercation with another passenger over the placement of baggage in an overhead bin. Again, the court granted summary judgment to the air carrier.

that Congress has demanded, and that § 44902(b) authorizes.[8]

Petitioner points out that Circuit Judges Torruella and Lipez[9] dissented from the First Circuit's denial of rehearing *en banc* as to the decision Petitioner characterizes as the "second" decision that morning, which was that of American's Dallas-based Systems Operations Center manager, Marquis, who told American's Boston-based supervisors that Cerqueira should not be rebooked on another American flight that day. *See* Pet. App. 64a. Judge Torruella thought the rebooking decision, made without the time urgency of Captain Ehlers' decision, may have been arbitrary or capricious. Pet. App. 69a. Judge Torruella also acknowledged, however, that the First Circuit's application of § 44902(b) to the rebooking decision was a "matter of first impression" among the circuit courts. Pet. App. 64a.

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[8] Judge Torruella, who dissented from the First Circuit's denial of rehearing *en banc*, agreed with the First Circuit panel's conclusion that Captain Ehlers' decision to remove Petitioner from the plane was neither arbitrary nor capricious. *See* Pet. App. 64a-65a.

[9] Judge Lipez concurred with Judge Torruella's dissenting opinion from denial of *en banc* rehearing, but wrote separately to identify what he perceived to be conflicting holdings among decisions within the First Circuit. Although a perceived conflict within the First Circuit is a proper consideration for that court to assess on a petition for rehearing *en banc*, it is not, without considerably more, a matter compelling the attention of the Supreme Court. *See, e.g., Davis v. United States*, 417 U.S. 333, 340 (1974).

The differences between the First Circuit's unanimous panel opinion and Judge Torruella's dissenting opinion from denial of rehearing *en banc* rest largely on different views of this specific factual record, including opposite conclusions about whether the decisions by the Captain and the SOC manager may properly be analyzed as "separate and independent decision[s]." Pet. App. 65a. As explained by the First Circuit's opinion, the record shows the SOC manager "made this decision based on the information communicated to him by the Captain, which included the Captain's information from those involved with the investigation in Boston." Pet. App. 17a, 36a, 37a & n. 19. The First Circuit concluded that "Petitioner's claim against the SOC manager's decision was derivative of the § 1981 claim against the Captain's decision." Pet. App. 36a-37a & n. 19. The district court did not submit to the jury Captain Ehlers' and the SOC manager's decisions as "separate and independent" claims of alleged discrimination.[10]

More significantly here, the First Circuit concluded there is no evidence in this record that the SOC manager's decision was based on racial discrimination, or that the SOC manager, working 1,500

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[10] The jury returned only a general verdict. It cannot be determined from the verdict whether the jury considered Captain Ehlers' decision separately from the SOC manager's decision, as Petitioner now suggests. Nor can it be determined from the general verdict whether the jury found any fact concerning the allegedly "separate" decision by the SOC manager.

miles away in Dallas, was even *aware* of Mr. Cerqueira's "appearance, race, or ethnicity." Pet. App. 37a. Consequently, regardless whether one might question, as Judge Torruella did, whether the SOC manager's decision may have been arbitrary or capricious, it certainly cannot be said, based on this trial record, that the manager's decision was influenced by race – here, the misperception of a non-decision-making flight attendant (who never spoke to the SOC manager) that Cerqueira appeared to be "Middle Eastern."

III. Neither § 44902(b) nor the safety policy it implements simply vanishes because a passenger alleges that an air carrier's refusal to transport was influenced by a racial consideration. There is no circuit conflict on this issue.

The first part of Petitioner's third "issue presented" is based on the same argument that caused jury instruction error in the district court below, which is that when a plaintiff alleges an air carrier's refusal to transport him was influenced by racial considerations, § 44902(b) simply falls out of the case, and the case should thereafter proceed as an ordinary § 1981 case as if it had arisen in an office, factory, or restaurant. Petitioner's argument is based on the claim that any air carrier decision to deny transport influenced, even indirectly, by the passenger's race is, *per se*, arbitrary or capricious and thus outside § 44902(b). So (as Petitioner's argument goes), when

a plaintiff alleges he was denied transport because of his race, the jury needs no instruction about § 44902(b) but instead should receive only the instructions given in an ordinary racial discrimination case. Petitioner's argument, if accepted, would vitiate § 44902(b) for any plaintiff who can claim he was discriminated against because of race, or as in this case, his "perceived race."

The First Circuit correctly rejected Petitioner's argument and held the district court's instructions to the jury were error because they: (1) failed to instruct about § 44902(b), Pet. App. 31a-34a; and (2) erroneously instructed that American could be held liable for the alleged bias of a non-decision-making flight attendant, despite a complete absence of evidence that the decision of the pilot-in-command, who made the decision at issue, was racially influenced. Pet. App. 34a-42a.

There is absolutely no conflict between the First Circuit's decision in this case and any other circuit court opinion addressing § 44902(b). Indeed, the First Circuit expressly agreed with, and adopted, the Second Circuit's explanation of § 44902(b) in *Williams* and the Ninth Circuit's similar explanation in *Cordero*. Pet. App. 27a-28a. As mentioned above, the district court refused in this case to give § 44902(b) instructions similar to those actually given in *Cordero*.

Petitioner quotes isolated sentences from several district court opinions to the effect that a refusal to

transport decision based only on a passenger's race would be arbitrary or capricious. American does not disagree with that statement in a vacuum, but none of those district court cases carry the logic of the statement as far as Petitioner claims they do. None held that when a passenger makes a claim of racial discrimination, all other considerations for which Congress enacted § 44902(b) disappear, that statute loses all effect, and the jury should not even be instructed about the discretion the statute confers on air carriers to act to protect safety.

In the second part of Petitioner's third issue, Petitioner tries to raise the specter of "racial profiling." There is no "racial profiling" issue in this case. Petitioner testified at trial that he was removed from the plane because he "looked like" the ponytailed man and that man's traveling companion and therefore incorrectly was associated with the suspicious conduct of those other two passengers. Cerqueira summarized his own case for the jury as follows: "if I hadn't looked like [the other two passengers], and if I hadn't happened to get seated next to them, it wouldn't have happened to me." (Appellant's Appendix in the Court of Appeals, Vol. 2, p. 278, Tr. 40-41).

Thus, giving Cerqueira every benefit of the doubt, this was, at most, a case of a mistaken identification or association by *one* flight attendant, who drew an incorrect conclusion based on the similar appearances of three men whom she did not know, but who were sitting together in an emergency exit

row.[11] That plainly is not "racial profiling," and it would present an extremely weak factual basis for this Court to undertake any analysis of alleged "racial profiling."

CONCLUSION

Petitioner has not established any compelling reason for this Court to grant the Petition. Therefore, Respondent respectfully requests that the Petition be denied.

Respectfully submitted,

MICHAEL A. FITZHUGH
FITZHUGH & MARIANI LLP
155 Federal Street, Suite 1700
Boston, Massachusetts 02110-1727
(617) 695-2330

MICHAEL V. POWELL
Counsel of Record
LOCKE LORD BISSELL & LIDDELL LLP
2200 Ross Avenue, Suite 2200
Dallas, Texas 75201-6776
(214) 740-8520

Counsel for Respondent
American Airlines, Inc.

[11] The First Circuit opinion explains: "Plaintiff's theory of discrimination was that Flight Attendant Two [Ms. Walling] was motivated by discriminatory bias based on national origin, because of plaintiff's appearance as having 'dark hair' and an 'olive complexion.'" Pet. App. 6a n. 3.

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IN THE
Supreme Court of the United States

JOHN D. CERQUEIRA,
Petitioner,
v.

AMERICAN AIRLINES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the First Circuit

PETITIONER'S REPLY

Michael T. Kirkpatrick
Counsel of Record
Public Citizen Litigation Group
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

David S. Godkin
Birnbaum & Godkin, LLP
280 Summer Street
Boston, MA 02210
(617) 307-6100

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PETITIONER'S REPLY

The petition presents important questions that arise with frequency in discrimination cases where motivation is at issue—questions on which the lower courts are split. In its brief in opposition, respondent American Airlines seeks to avoid this conclusion by recasting the questions presented to apply only to cases alleging discrimination in airline denial-of-service decisions.[1] American's arguments are unavailing. As explained below, the questions presented have application beyond aviation and, even if limited to aviation, the questions raise important issues at the intersection of safety and civil rights that should be settled by this Court.

1. This Case Is a Good Vehicle for the Court to Resolve the Ongoing Conflict Regarding the Circumstances Under Which a Defendant Is Liable for Discrimination Where Its Decisionmaker Acted on Information Tainted by the Bias of a Lower-Level Employee.

American does not dispute that 1) there is an entrenched conflict among the courts of appeals on the application of respondeat superior in discrimination cases where the challenged decision was driven by the bias of non-decisionmakers; 2) the issue is

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[1] In its fourth question presented, American purports to seek conditional review of an evidentiary issue not reached by the First Circuit, but American failed to comply with the conditional cross-petition requirements of Rule 12.5 of the Rules of this Court.

squarely presented in this case; and 3) the issue is worthy of the Court's review. Indeed, American does not deny that this is the same issue on which the Court granted certiorari in *BCI Coca-Cola Bottling Co. v. EEOC*, 127 S. Ct. 852 (2007), but the case was dismissed on petitioner's motion. 127 S. Ct. 1931 (2007). Rather, American suggests that this case is a poor vehicle for the Court to address the issue because this case involves discrimination in airline service.

First, American argues that because courts use the arbitrary-or-capricious standard to test whether an airline has properly exercised its discretion under 49 U.S.C. § 44902(b) to refuse to transport a passenger for safety reasons, and "[t]hat test does not apply in any of the employment, retail service, or public accommodation discrimination cases" cited in the petition, "this case would not be a good one for the Court to examine the issue of nondecision-maker bias or influence in ordinary discrimination cases." Brief in Opposition (BIO) at 10. American is correct that § 44902(b) applies only to airline denial-of-service cases, but American fails to recognize that the arbitrary-or-capricious standard does not raise the bar for plaintiffs alleging intentional discrimination on account of race, because decisions motivated by discrimination are *necessarily* arbitrary and capricious. *See* Pet. at 31-32. Thus, § 44902(b) does not provide any basis for distinguishing cases alleging discrimination in air transportation from cases alleging discrimination in any other activity, and it

provides no reason to deny certiorari on petitioner's first question presented.

Second, American argues that this case is "a poor choice for examining the subordinate bias issue" because "[w]hen an air carrier makes a decision to refuse to transport a passenger for safety reasons, it thereby acts to protect the lives of all other passengers and crew members aboard the aircraft[,]" and "[t]hat consideration does not apply in Title VII or § 1981 cases arising in employment or retail service environments." BIO at 10-11. American's argument is a red herring. If an airline denies service for legitimate safety reasons, the would-be passenger will be unable to prove that discrimination drove the decision. Moreover, anti-discrimination law is routinely applied to industries and in circumstances where safety is a concern.

American next argues that the Court should not consider the subordinate-bias issue in the airline denial-of-service context because exigent circumstances may prevent a pilot from investigating the veracity of a subordinate's report of suspicious passenger behavior before ordering the passenger's removal. BIO at 11. But rather than militating against review, American's observation regarding the time pressure that pilots may face favors granting the petition because this case presents the subordinate-bias issue in two different contexts. With respect to denial-of-service decisions made by airline officials other than pilots, there is no reason

to apply the doctrine of respondeat superior differently in airline service cases than in cases alleging discrimination in other activities. In this case, American's system operations manager, Craig Marquis, made the decision to refuse service to Cerqueira on any American Airlines flight even after the police concluded their investigation and cleared Cerqueira for travel. *See* Pet. App. 66a-69a (Torruella, J., dissenting from denial of reh'g en banc); *id.* at 73a (Lipez, J., dissenting from denial of reh'g en banc). Thus, this Court's resolution of the subordinate-bias issue with regard to the rebooking decision would not be limited to the aviation context.

With regard to denial-of-service decisions made by pilots based on crewmember reports, this case presents an excellent vehicle to resolve the conflict on the specific question of whether an airline may escape liability where a pilot acts without further inquiry on reports from subordinates motivated by discrimination. The decision of the First Circuit in this case, holding that "[t]he biases of a non-decisionmaker may not be attributed to the decisionmakers" and that a pilot "is entitled to accept at face value the representations made to him by other air carrier employees," Pet. App. 30a, directly conflicts with the Ninth Circuit's conclusion that an airline may be liable for a discriminatory removal if a pilot, acting on a crewmember's report of passenger misbehavior, excludes a passenger "without even the most cursory inquiry into the complaint against him." *Cordero v. Cia Mexicana De*

Aviacion, S.A., 681 F.2d 669, 672 (9th Cir. 1982). American claims that the decisions do not conflict because *Cordero* held only that the jury was *entitled* to find that the removal decision was arbitrary and capricious because the pilot accepted at face value the flight attendant's report, but not that the pilot's failure to inquire *required* the jury to find the decision arbitrary or capricious. BIO at 12-13. American's argument is misplaced. The significance of *Cordero* is that an airline can be liable for the wrongful removal of a passenger even where the pilot who made the decision lacked discriminatory intent if the pilot acted on information supplied by a biased subordinate and did not make even a cursory inquiry into the veracity of the complaint. In this case, the First Circuit held just the opposite. Pet. App. 30a.

Even if resolution of the subordinate-bias issue in this case were limited to the aviation context, the issue would still be worthy of this Court's review because it recurs frequently and the First Circuit's decision conflicts with the government's position on the matter. As explained in the petition (at 36-38), since the terrorist attacks of September 11, 2001, the Department of Transportation (DOT) has received many complaints of discrimination by airlines against passengers perceived to be of Arab, Middle Eastern, or South Asian descent. Significantly, DOT's Enforcement Office disagrees with the First Circuit's conclusion that a pilot "is entitled to accept at face value the representations made to him by other air carrier employees." Pet. App. 30a. In its

brief in opposition, American attempts to downplay the conflict by arguing that it is only DOT's Enforcement Office and not the agency as a whole that has taken this position, but American cites no authority suggesting that any other component of DOT has taken a different view. BIO at 13-14. To the extent there is any doubt about the government's position, the Court should call for the views of the Solicitor General.

2. The Court Should Grant Certiorari to Clarify Whether, and in What Circumstances, a Plaintiff May Use Indirect Evidence to Prove Discrimination in Activities Other Than Employment.

American does not dispute that the First Circuit's refusal to apply the *McDonnell Douglas* framework to cases alleging discrimination in activities other than employment creates a conflict with the decisions of numerous other federal courts of appeals (*see* cases cited in the petition at 23-25), or that the application of *McDonnell Douglas* outside the employment context has been a source of confusion for a number of courts (*see* cases cited in the petition at 25-26). Rather, American argues that the Court should deny certiorari on the issue because American claims that there is no circuit-level split in airline denial-of-service cases, and because a case involving two separate incidents of discrimination is too complex for this Court's review. American's arguments are flawed and provide no basis to deny certiorari.

As an initial matter, American misses the point when it echoes the decision below and asserts that the *McDonnell Douglas* framework cannot be applied in airline-service cases because it is the plaintiff's burden to prove that the decision was arbitrary or capricious and thus beyond the protection of § 44902(b). BIO at 15; *see* Pet. App. 38a-39a. The issue is not whether it is the plaintiff's burden to prove discrimination (which would necessarily prove that the decision was arbitrary and capricious); rather, the issue is whether a plaintiff can meet his burden with indirect evidence.

American claims that the First Circuit's decision rejecting the *McDonnell Douglas* model in airline-service cases does not conflict with four federal court decisions cited in the petition (at 25) that applied the model in airline-service cases, but American never explains how the decisions can be reconciled. *See* BIO at 16 & n.7. Indeed, the First Circuit expressly acknowledged its disagreement with another court's use of the framework. Pet. App. 39a n. 21 ("The district court in *Dasrath* . . . did use the *McDonnell Douglas* model, in our view incorrectly." (citing *Dasrath v. Continental Airlines, Inc.*, 467 F. Supp. 2d 431, 445 (D.N.J. 2006))).

American also asserts that this case is not a good vehicle to examine the use of indirect evidence to prove discrimination in activities other than employment because Cerqueira brought two separate claims of discrimination and that, according to

American, is a matter of "great factual complication." BIO at 17. To the contrary, having two separate claims of discrimination makes this case a particularly good vehicle to examine the issue of whether airline denial-of-service decisions are exempt from the *McDonnell Douglas* burden-shifting methodology. Indeed, Judge Torruella's dissent from denial of rehearing en banc, joined by Judge Lipez, was particularly critical of the First Circuit's rejection of the *McDonnell Douglas* model with regard to the rebooking decision. Pet App. 68a.

Similarly, American's claim that the differences between the First Circuit's panel opinion and the opinions of the judges who dissented from denial of rehearing en banc "rest largely on different views of th[e] specific factual record" is not correct. Cerqueira's petition for rehearing en banc was denied by a three-to-two vote of the active judges of the First Circuit, and the dissenting judges voiced strong disagreement with the panel opinion on purely legal issues. *See* Pet. App. 63a-73a. Moreover, given that this case was decided by a jury, differing views of the factual record would provide no reason to deny certiorari, because a reviewing court must examine the evidence in the light most favorable to preservation of the jury's verdict. At trial, Cerqueira presented direct evidence of discriminatory animus by subordinate employees who influenced the decisions, and indirect evidence of discrimination by the formal decisionmakers. The First Circuit reversed and entered judgment for American based on

its legal conclusion that Cerqueira had to rely only on direct evidence of discrimination by the formal decisionmakers, and he could not prevail under that standard. Thus, this case provides an excellent opportunity to clarify whether Cerqueira can use indirect evidence, because the outcome of the case turns on that purely legal question.

3. The Court Should Grant Certiorari to Provide Guidance on Whether § 44902(b) Limits an Airline Passenger's Right Under § 1981 to Be Free From Race Discrimination.

American claims that "[t]here is absolutely no conflict between the First Circuit's decision in this case and any other circuit court opinion addressing § 44902(b)," and observes that "the First Circuit expressly agreed with, and adopted, the Second Circuit's explanation of § 44902(b) in *Williams* and the Ninth Circuit's similar explanation in *Cordero*." BIO at 21 (citing Pet. App. 27a-28a (citing *Williams v. Trans World Airlines*, 509 F.2d 942, 948 (2d Cir. 1975) and *Cordero*, 681 F.2d at 671-72)). But the First Circuit agreed with *Williams* and *Cordero* only on a point that is not in dispute; specifically, that § 44902(b) allows an airline to refuse to transport a passenger for safety reasons if the decision is not arbitrary or capricious. Indeed, the district court in this case was "convinced by the weight of persuasive authority that the 'arbitrary and capricious' standard does in fact apply." Pet. App. 45a (citing *Williams*).

The issue on which the courts are split is whether the authority granted by § 44902(b) limits anti-discrimination law. In this case, the district court held that the failure to give an explicit jury instruction on § 44902(b) and the arbitrary-and-capricious standard was not error, reasoning that "since this Court did instruct the jury that American's liability depended upon a finding of intentional discrimination on account of race, the jury verdict necessarily satisfied the standard of 'arbitrary and capricious.'" Pet. App. 47a (internal citations omitted). The First Circuit disagreed. Pet App. 36(a). It is that disagreement—based on the First Circuit's conclusion that a decision that would otherwise violate the prohibition on discrimination in 42 U.S.C. § 1981 may be protected by § 44902(b)—that puts the decision below in conflict with the Second Circuit's decision in *Williams*, 509 F.2d at 948; the Ninth Circuit's decision in *Cordero*, 681 F.2d at 672; and the district court decisions in *Shqeirat v. U.S. Airways, Inc.*, 515 F. Supp. 2d 984, 1004 (D. Minn. 2007); *Dasrath*, 467 F. Supp. 2d at 434; *Alshrafi v. American Airlines, Inc.*, 321 F. Supp. 2d 150, 162 (D. Mass. 2004); *Bayaa v. United Airlines, Inc.*, 249 F. Supp. 2d 1198, 1205 (C.D. Cal. 2002); and *Chowdhury v. Northwest Airlines Corp.*, 238 F. Supp. 2d 1153, 1154 (N.D. Cal. 2002). *See* Pet. at 31-34. Indeed, if the First Circuit agreed with those courts that any action that violates § 1981 is necessarily beyond the protection of § 44902(b), the First Circuit would not have rejected Cerqueira's argument that a jury instruction on § 44902(b) was unnecessary because the district

court instructed the jury that Cerqueira had to prove that American's actions were motivated by discrimination.

Not only does the First Circuit's decision conflict with the seven cases cited above, it also allows § 44902(b) to shield airlines from liability for denial-of-service decisions driven by racial stereotypes. Apparently recognizing that this holding alone is of such exceptional importance that it warrants this Court's review, American tries to wish it away by insisting that "[t]here is no 'racial profiling' issue in this case." BIO at 22. American is wrong. The jury found that, but for Cerqueira's Middle Eastern appearance, he would not have been removed from his flight and denied further service. The First Circuit's decision upholding such actions as a lawful exercise of an airline's discretion to deny transport for safety reasons allows airlines to rely on racial characteristics in deciding which passengers are dangerous. American's denial that the decision implicates racial profiling underscores the need for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Michael T. Kirkpatrick
Counsel of Record
Public Citizen Litigation Group
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

David S. Godkin
Birnbaum & Godkin, LLP
280 Summer Street
Boston, MA 02210
(617) 307-6100

August 2008

Counsel for Petitioner